Petition

81-757

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

W. WAYNE ALLEN, *Intervenor, Petitioner,*

v.

INEZ WRIGHT, Individually and on behalf of her minor children, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT, and EPHRON ANTONI WRIGHT, JR., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Do plaintiffs, black parents of public school children, have standing to sue the Secretary of the Treasury and the Commissioner of Internal Revenue for an injunction requiring revision of federal income tax regulations relating to tax-exempt private schools, where plaintiffs allege no actual injury to themselves either by any private school or by the tax regulations?

2. Should a federal court entertain a suit to require revision of federal income tax regulations relating to tax-exempt private schools when Congress has passed legislation expressly forbidding the Internal Revenue Service from adopting virtually the same regulations which the suit seeks to have the court require it to adopt?

3. Should a federal court entertain a suit by plaintiffs unaffected by a federal income tax regulation, where the only complaint about the regulation is that it permits some parties unrelated to the plaintiffs to "slip through the Commissioner's net of enforcement" through "inadequate monitoring procedures."?

4. Does the requisite diversity of interest exist, so as to constitute a case or controversy and thus confer jurisdiction on a federal court, where plaintiffs sue the Secretary of the Treasury and Commissioner of Internal Revenue to require revisions of federal income tax regulations which are almost identical to revisions which the defendants have themselves proposed and have been prevented from effectuating, first, by public outcry against them and then by Congressional action forbidding them?

PARTIES INVOLVED

INEZ WRIGHT, individually and on behalf of her minor children, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT and EPHRON ANTONI WRIGHT, JR., 734 Barrett Place, Memphis, Tennessee (901/521-1588);

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DELORES G. BEAMON, individually and on behalf of her minor children, RYNTHIA BEAMON, REUBEN BEAMON, JR., CYNTHIA BEAMON, and MELVIN BEAMON, 343 Dyas Drive, Montgomery, Alabama (205/262-5519);

MARY LOUISE BELSER, individually and on behalf of her minor children, CHARLOTTE BELSER, CONNIE BELSER, JANICE BELSER, LAWRENCE BELSER, MARVIN BELSER, and ANTHONY BELSER, 724 N. Union Circle, Montgomery, Alabama (205/269-9930);

ETHERLINE HOUSE, individually and on behalf of her minor children, ELMORE HOUSE, ROGER HOUSE and ZACHARY HOUSE, 1575 Hale Street, Montgomery, Alabama (205/262-5519);

LOU ELLA JACKSON, individually and on behalf of her minor children REGINA JACKSON, ANGELA JACKSON, PHYLLIS JACKSON, GREGORY JACKSON, MICHELE JACKSON, DORA LEE JACKSON, LEWIS JACKSON, JR. and SANDRA JACKSON, 4022 Berwick Drive, Montgomery, Alabama (205/281-3833);

MARIE MATTHEWS, individually and on behalf of her minor children, WILLIE CLAY MATTHEWS, STEPHA-

NIE MATTHEWS, MICHAEL JAMES MATTHEWS and ALEXANDER MATTHEWS, 1850 French Street, Montgomery, Alabama (205/262-5519);

ELSIE R. WALKER, individually and on behalf of her minor children, SONJA S. WALKER and CORNELL E. WALKER, JR., Route 2 Box 209, Farmville, Virginia (804/392-6283);

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ANNIE L. JOHNSON, individually and on behalf of her minor child, HOWARD JOHNSON, JR., 611 Pyramid Court, Cairo, Illinois (618/734-2635);

MABLE HOLLIS, individually and on behalf of her minor children, BERNADIAN HOLLIS and FRANK HOLLIS, 432 16th Street, Cairo, Illinois (618/734-2446);

HYLAND L. DAVIS, individually and on behalf of his minor children, DAMO. A. DAVIS and TROY A. DAVIS, 1802 Duke Street, Beaufort, South Carolina (803/524-5697);

LAWRENCE WASHINGTON, individually and on behalf of his minor children, YOULAND J. WASHINGTON and JERRY J. WASHINGTON, P.O. Box 17, Seabrook, South Carolina (803/846-8945);

RENA M. ROBINSON, individually and on behalf of her minor children, ANGELA CHRISTINE ROBINSON and CAROL DENISE ROBINSON, P.O. Box 248, Bowman, South Carolina (803/829-2855);

ROBERT C. ZIMMERMAN, individually and on behalf of his minor children, ROBERT ZIMMERMAN, JR., PAUL ZIMMERMAN, CYNTHIA ZIMMERMAN and ANDREA ZIMMERMAN, Route 1, Box 237BB, Bowman, South Carolina (803/829-2811);

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LAVINIA WASHINGTON, individually and on behalf of her minor children, STEPHEN WASHINGTON, GREGORY WASHINGTON, ELIOT WASHINGTON and KEVIN WASHINGTON, P.O. Box 621, Holly Hill, South Carolina (no phone);

ROBERT JACKSON, individually and on behalf of his minor child, ROBERT JACKSON, JR., 1040 Sixth, Natchitoches, Louisiana (318/352-5286);

MOSES WILLIAMS, individually and on behalf of his minor children, RHONDA RENSE WILLIAMS, MATRA LUCILLE WILLIAMS and LULA MARIE WILLIAMS, 601 W. Green Street, Tallulah, Louisiana (318/574-2834);

FRED BRACY and BETTY BRACY, on behalf of themselves and on behalf of their minor children, WILLIE BRACY and ROBERT BRACY, 4104 Church Street, Monroe, Louisiana (318/325-5457);

ALMA LEE GRIFFIN and DARNELL GRIFFIN, on behalf of themselves and on behalf of their minor children, GREGORY GRIFFIN, CAROL DYNE GRIFFIN, VEPLINE ANN GRIFFIN, CARMEN GRIFFIN, and TERRY GRIFFIN, 802 S. 20th Street, Monroe, Louisiana (318/387-8655);

HERBERT H. JACKSON, individually and on behalf of his minor children, CARLA CUMBERLANDER, VINCENT CUMBERLANDER, FRANCINE CUMBERLANDER, and HERBERT H. JACKSON, JR., 37 Schuyler Street, Roxbury, Massachusetts (617/427-8199);

on behalf of themselves and all others similarly situated;

DONALD REGAN, Secretary of the Treasury, 15th & Pennsylvania Avenue, Washington, D.C. 20220;

ROSCO EGGER, Commissioner of the Internal Revenue Service, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C. 20224;

W. WAYNE ALLEN.

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Wright v. *Regan*, No. 80-1124, Order denying suggestion for rehearing *en banc*, (Judges Tamm, MacKinnon and Robb dissenting) (D.C. Cir. dated Aug. 26, 1981). Not published.

Wright v. *Regan*, No. 80-1124, Order denying petition for rehearing (D.C. Cir. dated Aug. 26, 1981). Not published.

GROUNDS FOR JURISDICTION

The opinion and judgment sought to be reviewed was dated and entered on June 18, 1981.

An order denying suggestion for rehearing en banc and an order denying petition for rehearing were entered on August 26, 1981.

Jurisdiction is conferred on this Court to review by certiorari the judgment of the Court of Appeals by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. *Fifth Amendment to the Constitution*

AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. *Fourteenth Amendment to the Constitution*

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *Section 501(c)(3) of the Internal Revenue Code*

26 U.S.C. § 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under the subtitle unless such exemption is denied under Section 502 or 503. * * *

(c) List of exempt organizations.—The following organizations are referred to in subsection (a):

* * *

3. Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

4. *412 U.S.C. § 1981*

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

5. *Treasury, Postal Service, and General Government Appropriations Act, 1980, P.L. 96-74, 93 Stat. 559.*

SEC. 103. None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

* * *

SEC. 615. None of the funds available under this Act may be used to carry out proposed revenue procedure 4830-01-M of the Internal Revenue Service entitled "Proposed Revenue Procedure on Private Tax-Exempt Schools" (44 F.R. 9451 through 9455, February 13, 1979, F.R. Document 79-4801), and proposed revenue procedure 4830-01 of the Internal Revenue Service entitled "Proposed Revenue Procedure on Private Tax-Exempt Schools" (43 F.R. 37296 through 37298, August 22, 1978, F.R. Document 78-23515), or parts thereof.

* * *

6. ***Proposed IRS Revenue Procedure, 43 Fed. Reg. 37296***

(See Appendix)

7. *Modified Proposed IRS Revenue Procedure, Internal Revenue News Release 2/9/79*

(See Appendix)

8. *IRS Revenue Procedure 75-50, 40 Fed. Reg. 53409*

(See Appendix)

STATEMENT OF THE CASE

This is a suit for declaratory and injunctive relief against the Commissioner of the Internal Revenue Service and the Secretary of the Treasury (hereinafter referred to as IRS) by twenty-five sets of black parents who have children attending public schools which are located in seven states extending from Louisiana to Massachusetts.

The object of the suit is to obtain an injunction requiring the IRS to modify its tax regulations so as to deprive approximately 3,500 private schools of federal income tax exemption and deductibility status.

The Complaint alleged jurisdiction in the District Court based on 28 U.S.C. §§ 1331, 1343(4), 1361, 2201 and 2202, and 5 U.S.C. §§ 702-06.

The essence of the complaint is that the IRS has violated section 501(c)(3) of the Internal Revenue Code, Title VI of the Civil Rights Act of 1964, Section 1 of the Civil Rights Act of 1866, and the Fifth and Fourteenth Amendments to the Constitution of the United States by allowing tax exemptions to "more than 3,500 racially segregated private academies

operating in the country having a total enrollment of more than 750,000 children."[1] (App. 17).

The complaint admitted that the IRS had issued regulations which deny tax exemptions to schools which practice racial discrimination, and attached to the complaint was a copy of the existing Revenue Procedure 75-50.

The complaint made no allegation that any child of the Plaintiffs, or any other child, has ever been discriminated against by any of the "target" schools. It made no allegation that any of the Plaintiffs' children has ever applied for admission to any of such schools.

The complaint made no allegation that any of the Plaintiffs' children were being forced to attend segregated public schools.

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[1] The term "segregated", used throughout the Plaintiffs' complaint, is used as a term of art, and does not imply an allegation that "racially segregated" is equivalent to "discriminatory." Plaintiffs could not, in good faith, represent to the Court that all of the 3,500 "racially segregated" schools are discriminatory, in the sense that they actually discriminate against black students; nor could such a statement be made about the "thousands of other racially segregated independent private schools . . . which have received, applied for, or will apply for, federal tax exemptions" (App. 27) nor about the "[a]dditional racially segregated private schools" which the Complaint alleges "may be organized or expanded, many of which have received, applied for, or will apply for, federal tax exemptions." (*Id.*) It is clear that Plaintiffs' term "racially segregated" means nothing more than all, or predominantly white.

References to "App." in this section are to the Appendix in the Court of Appeals, which has been requested to be transmitted to this Court.

The complaint did not allege that any of the 3,500 "target" schools actually discriminated against black students in any way.

The only "injury" which the Plaintiffs asserted was that the failure of the IRS to revoke or deny tax exemption to the more than 3,500 target schools

> constitutes federal financial aid and other support for racially segregated educational institutions, and fosters and encourages the . . . operation and expansion of such institutions. . . . (App. 34)

By way of relief, the Plaintiffs sought to have the Court force the IRS to adopt a presumption of guilt of discrimination and to apply that presumption against each of the more than 3,500 target schools.

The presumption of guilt would be based upon three facts:

1. Insubstantial or nonexistent minority enrollment in the school;

2. Location of the school in a desegregating public school district; and

3. Any *one* of the following three facts:

> A. The school was established or expanded at or about the time the public schools in its area were desegregating; *or*
>
> B. The school has been determined in an adversary judicial or administrative proceeding to be racially segregated; *or*
>
> C. The school cannot demonstrate that it does not provide racially segregated educational opportunities for white children. (App. 37).

Plaintiffs would have the Court require the IRS to rewrite its regulations to establish the above presumption, and to use it to deny tax exemptions to all schools thus presumed guilty of discrimination.

Shortly after the filing of the complaint, newspaper accounts alerted W. Wayne Allen, the Chairman of the Board of Trustees of the Briarcrest School System in Memphis to the pendency of the action. Briarcrest was one of the schools specifically mentioned in the complaint as a "segregated academy."[2]

Mr. Allen's Motion to Intervene pointed out that he was an adherent of the Christian faith and had chosen to have his children educated at Briarcrest because of the spiritual, moral and philosophical principles underlying its pedagogy, and that this interest would be detrimentally affected if Briarcrest were to lose its tax exempt status. Mr. Allen's Motion to Intervene was granted by order of May 17, 1977, and on May 31 he was given leave to file a Motion to Dismiss.

The intervenor Allen's Motion to Dismiss was based upon several grounds, including Plaintiffs' lack of standing to sue, and the failure to state a claim upon which relief can be granted.

The IRS also filed a Motion to Dismiss on several grounds, including lack of standing and the lack of factual nexus between Plaintiffs' claims and the grant of exemptions to the target schools, and the nonreviewability of the actions of the IRS in administering its

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[2] Immediately after Mr. Allen intervened, Briarcrest was subjected to a rigorous investigation by the IRS, to determine its compliance with Rev. Proc. 75-50. It was found to be in compliance, and operating in a nondiscriminatory manner.

own regulations with respect to racial discrimination in private schools.

On November 26, 1979, Judge Hart issued an opinion in which he granted the motions to dismiss on the grounds that:

> (A) the *Wright* Plaintiffs lack standing to assert their claims;
>
> (B) the action of the *Wright* plaintiffs is barred by the doctrine of nonreviewability;
>
> (C) recent Congressional action suggests that this Court should not fashion a remedy for the *Wright* plaintiffs. (App. 73).[3]

On the standing issue, the Court held (1) that the Plaintiffs had "failed to assert a distinct, palpable and concrete injury," (2) that even if Plaintiffs had asserted such an injury, it was not fairly traceable to the actions of the defendants," (3) that even if Plaintiffs had satisfied the first two criteria, it was speculative that the relief requested would remedy the injury; and (4) even if Plaintiffs satisfied all three of the above criteria, there was lacking the necessary concrete adverseness to satisfy the case or controversy requirement of Article III of the Constitution. (App. 74-80).

With respect to the nonreviewability issue the Court held that a review of the IRS's actions concerning more than 3,500 "racially segregated" private academies would require the Court to exercise an extensive administrative expertise and would involve it deeply in the practical day-to-day operations of the IRS, and

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[3] References to "App." hereafter are to the Appendix to this petition.

that the appropriate remedy for discrimination by a particular school should be lawsuit filed against that school. (App. 81-83).

With respect to the third grounds for dismissal, the Court referred to a proposed new IRS Revenue Procedure published at 43 Fed. Reg. 37296, (App. 72) and a modification thereof issued in February 1979, by which the IRS would have voluntarily adopted regulations which included virtually the identical presumption of guilt against private schools which was sought to be required by the injunction applied for in the present case. (App. 72). The Court pointed out that the Congress, in response to the proposed regulations, had enacted the "Ashbrook and Dornan Amendments" to the General Appropriations Act of 1980, both of which expressly forbade the use of any funds for the formulation or carrying out of the proposed IRS guidelines. (App. 83). The action of the Congress effectively retained, at least for one year, the existing Revenue Procedure 75-50, which the Plaintiffs had attached as being violative of Section 501(c)(3) of the Internal Revenue Code. The Court held that the Ashbrook and Dornan amendments provide:

> [a] complete and total refutation of the contention . . . that existing regulations are legally insufficient, and that Section 501(c)(3) of the Internal Revenue Code requires adoption of the presumed-guilty-until-proven-innocent approach which requires of private schools "proofs" of nondiscrimination. . . (App. 84).

The court pointed out that:

> If Plaintiffs were to be granted the relief they seek in this case, it would be completely contrary to Congressional intent and policy. The actions by

> Congress are the strongest possible expressions of the Congressional intent that Section 501(c)(3) of the Internal Revenue Code is not susceptible of the construction which plaintiffs would place upon it in this case. (*Id.*)

On appeal, a divided court reversed and remanded the cause for trial. Referring to "divergent Supreme Court precedent" the court said:

> In the welter and confusion of case law and commentary, there is one point of clear agreement: '[L]ower courts and practitioners especially need Supreme Court guidance.' The guidance the High Court has supplied relevant to the case at hand points in opposite directions. (Footnote omitted) (App. 15b).

The court recognized that *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) leaves "the door barely ajar for third party challenges" to the tax exemption of another entity. (App. 16b). It recognized that other District of Columbia Circuit cases had similarly denied standing to plaintiffs who sought to litigate the tax status of other parties than themselves, *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978); and also to plaintiffs complaining of United States cooperation in programs fostering Saudia Arabia's economic development, *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. 1978).

The court held, however, that "*Eastern Kentucky* is not the line appropriately followed in the matter before us," because this case involves "an overriding,

constitutionally rooted national policy against racial discrimination in the United States educational institutions." (App. 18b)

Recognizing that the plaintiffs "maintain they have no interest whatever in enrolling their children in a private school" (App. 13b), and that "plaintiffs do not allege that any particular school turns away students on the basis of race" (App. 22b, n.27), the Court stated that

> The sole injury they claim is the denigration they suffer as black parents and school children when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth. (App. 13b).

(The court never explained how it concluded that the schools treated blacks as persons of lesser worth, when there was no allegation that any tax exempt school had turned them away or discriminated against them in any way.)

The court brushed aside the Congressional actions forbidding the effectuation of IRS-proposed regulations similar to those sought by the plaintiffs on the ground that such action bound only the IRS, not the courts.

The court declined to apply the doctrine of non-reviewability because plaintiffs' "alleged injury, and the relief they seek, are directed to what a government agency, the IRS, is doing." (App. 34b); and also because it felt that the oversight of IRS actions required of the court would not be unduly burdensome.

On the issue of the adverseness of interest necessary to create a case or controversy, the court merely

pointed out that the IRS had successfully defended itself in the trial court, and that intervenor Wayne Allen was a "strong advocate" for the private schools.

Circuit Judge Tamm, dissenting, cited *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) for the proposition that an allegation of violation of a constitutional right was not sufficient to provide standing, in the absence of actual injury.

Most significantly, Judge Tamm pointed out that the majority applied a special constitutional rule of standing to these plaintiffs, solely because they were blacks asserting a civil rights complaint. He said

> . . . the court defines the right asserted here as "the right of black citizens to insist that their government 'steer clear' of aiding" institutions that discriminate. . . . Because of the significance of this right, it seems the majority does not apply the principles of standing applicable to other plaintiffs attempting to assert other rights. (App. 54b).

This case is unique in that the majority opinion emphatically expresses the need for a Supreme Court review of the important statutory and Constitutional issues involved in this case.

REASONS FOR GRANTING THE WRIT

I.

A majority of the Court of Appeals [*] has expressly declined to follow the holding of *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) that an essential requirement of a plaintiff's standing

[*] Judge Tamm, Circuit Judge, dissenting.

to sue in federal court is an allegation that he has suffered a particularized injury, demonstrably resulting from defendant's action, which injury will be redressed by the remedy sought. The Court of Appeals refused to apply that test on the ground that it perceives two "divergent lines of Supreme Court decision," providing "guidance which points in opposite directions," on the question of standing to sue.

The essence of the holding of the Court of Appeals is that there are two different and inconsistent lines of Constitutional principles in the area of federal jurisdiction, one for ordinary litigants and another for blacks in civil rights cases. It holds that the ordinary Constitutional requirements for standing do not apply to black citizens complaining against government action giving "aid or comfort" to discriminatory private schools, so that they are entitled to invoke federal jurisdiction which the Constitution denies to other litigants.

The Court of Appeals has held that black parents of public school children have standing to sue for an injunction to require the Internal Revenue Service to change its regulations regarding tax-exempt private schools, despite the fact that no private school is alleged to have discriminated against any of these black children, or any others, in any way whatsoever, and despite the fact that there is no allegation of any actual injury to any plaintiff, or the child of any plaintiff. Thus the Opinion holds that a line of precedent, inconsistent with *Eastern Kentucky,* requires the Court

> to abandon long-established standing principles limiting the exercise of judicial power to the redress of *actual injury.*[5]

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[5] Dissent, App. 38b. Emphasis by the writer.

By abolishing the requirement of injury as a prerequisite to standing, this opinion drastically expands the Constitutional power of the federal courts, and in particular, their power to control the policies and actions of the legislative and executive branches of government.

The holding that the Supreme Court has established conflicting and inconsistent standards of federal jurisdiction for different classes of litigants will lead to chaos in the lower courts, as they seek to determine which of the different standards apply in each case.[6]

The abolition of actual injury as a prerequisite to standing is in direct conflict with the holdings of this Court in *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979) *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 490 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *United States* v. *SCRAP*, 412 U.S. 689 (1973); *Laird* v. *Tatum*, 108 U.S. 1 (1971); *Sierra Club* v. *Morton*, 405 U.S. 166 (1972); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Ex Parte Levitt*, 302 U.S. 633 (1937), and with holdings of the United States Courts of Appeals in *Daughtrey* v. *Carter*, 584 F.2d 1050 (D.C. Cir. 1978); *Reuss* v. *Balles*, 584 F.2d 461 (D.C. Cir. 1978);

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[6] Judge Tamm's dissent points out that:

> The logical result of the Court's holding today is, for example, that female plaintiffs may be heard to complain simply that certain public programs are not being administered efficiently and thereby operate to discriminate against others of their sex. (Dissent, Slip Op., p. 20).

American Jewish Congress v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978); *Tax Analysts and Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977); *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977); *City of Hartford* v. *Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976); *Rhode Island Commission on Energy* v. *General Services Administration*, 561 F.2d 397 (1st Cir. 1977); *Mulgueeny* v. *National Commission on the Observance of International Women's Year*, 549 F.2d 1115 (7th Cir. 1977) *Bowker* v. *Morton*, 541 F.2d 1347 (9th Cir. 1976).

The Court of Appeals has done precisely what Justice Stewart, concurring in *Eastern Kentucky*, said was inconceivable; it has granted to persons whose own tax liability is not affected "standing to litigate the federal tax liability of someone else." 426 U.S. at 46.

II.

In 1979, Congress took legislative action[7] to prevent the Internal Revenue Service from putting into effect regulations which are almost identical in effect to the remedy sought by the plaintiffs by way of injunction in this case. Similar legislation is now before Congress

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[7] 125 Cong. Rec. H 5879-86 (daily ed. July 13, 1979; H 5979-83; (daily ed. July 16, 1979); *id.* S 11829-54 (daily ed. Sept. 5, 1979); Gen. Gov't Appropriations Act 1980, Pub. L. No. 96-74, §§ 103, 615, Stat 559. These are usually identified as the Ashbrook and Dornan amendments to the Treasury Appropriation Bills for 1980.

The following year, there was no new appropriations act, but rather a series of resolutions continuing the same appropriations into the next year. *See*, e.g. Pub. L. No. 96-536, 94 Stat. 3166; Pub. L. No. 97-12, 95 Stat. 95. The issue was hotly debated in Congress. 126 Cong. Rec. H 7206-18 (daily ed. Aug. 19, 1980); *id.* H 7289-93 (daily ed. Aug. 29, 1980).

for enactment in 1981, but no final action has been taken. The Court of Appeals has brushed aside this clear indication of Congressional intent by construing it as not controlling on "judicial dispositions."[8] The Court has thus declared that, in construing the Internal Revenue Code, it is not bound by a clear, emphatic declaration of Congressional intent on the precise issue under consideration.

Since the issuance of the Opinion under review, the House of Representatives has, by a vote of 337 to 83, adopted language in the proposed 1981 legislation which is expressly designed to reverse the Court's ruling on that point. Congressional Record H 5392-8, (daily ed. July 30, 1981).

If the Court of Appeals' opinion were allowed to stand, the clearly and repeatedly expressed intent of Congress with respect to the Internal Revenue Code would be thwarted.

III.

The Court of Appeals held that the doctrine of nonreviewability was not applicable to this case. It approved in principle the power of a federal court not only to declare that an IRS regulation is inadequate, but also to re-draft the regulation in the Court's own language. This would be a radical departure, even if the regulation in question was directed at the plaintiffs and was alleged to infringe upon their rights of property or freedom of action. But such is not the case of the regulation here in question. (Revenue Procedure 75-50, relating to tax exempt schools).

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[8] App. 30b.

There is no issue in this case of plaintiffs being actually injured by the existing regulations, which were directed, not at plaintiffs, but at private schools with which plaintiffs had never had any relationships whatsoever. The existing regulations clearly and explicitly required private schools which desired tax exemptions to adopt non-discriminatory policies, to advertise those policies in the black community, to follow them faithfully, and to report upon them annually under penalties of perjury. The regulations encouraged any person having knowledge of a violation of such non-discriminatory policies by an exempt school to report it to the IRS. It was made abundantly clear that any discriminatory practices would result in loss of tax exempt status.

There was no allegation that the IRS was deliberately allowing tax exemptions to schools which practiced discrimination.* The most that was contended was that "some schools 'are slipping through the Commissioner's net of enforcement,'" (App. 22b n.27) through

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* The court departs from the record to cite a contention by then IRS Commissioner Kurtz that "a number of schools retained tax exempt status although they had been adjudged racially discriminatory by federal courts in non-tax cases." Slip Op., p. 29. If this incredible claim be true, it is not the fault of the then existing Rev. Proc. 75-50. If the IRS knew of specific schools adjudicated to be discriminatory, it is inconceivable that it should await additional regulations before proceeding against them. It had in fact revoked other schools' exemptions on that ground. *Prince Edward School Foundation* v. *Comm'r*, 478 F. Supp. 197 (DDC 1979). In fact, more than 100 schools have lost their exemptions by IRS action. (Statement of Congressman Hammerschmidt, 125 Cong. Rec. H 5884 (daily ed. July 13, 1979).

the "inadequacies of its monitoring procedures" (App. 19b)[10]

Under these circumstances, a judicial rescission and rewriting of administrative tax regulations clearly would usurp the power granted by Congress to the Secretary of the Treasury to administer and enforce the revenue laws (28 USC § 7801(a)) and to "prescribe all needful rules and regulations for the enforcement of this title." (26 USC § 7805(a)). Yet, by accepting plaintiffs' complaint, the court implicitly arrogates to the judiciary the power to "prescribe . . . needful rules and regulations" to enforce the tax laws. Such a ruling, if allowed to stand, would constitute a drastic shift of Constitutional power from the executive to the judicial branch of government.

IV.

The Court of Appeals accords to the complaint the status of a "case or controversy," despite the lack of any conflict, or even divergence, of interest between the plaintiffs and the government defendants on the substantive issues in the case.

The ultimate design of the plaintiffs is to eliminate federal tax exemptions of private schools and deductions for contributions to those schools, thus increasing government income tax revenues. The IRS has proposed tax regulations which would accomplish almost identically what the plaintiffs seek in their complaint.

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[10] This was then parlayed by the court into a policy of "prohibited government support for race discrimination in educational facilities," (App. 34b), and a policy which "graces with tax exempt status" discriminatory schools (App. 13b).

While the government's original answer denied plaintiffs' contention that the IRS regulations were inadequate, subsequent settlement conferences between the plaintiff and the government—conferences of which intervenor Allen was not even informed, although he alone speaks for the interests of the private schools—produced a proposed Revenue Procedure which followed closely the formula proposed by plaintiffs for imposing upon private schools a presumption of guilt of discrimination, and a virtually impossible burden of proof to rebut that presumption. Only after receiving 150,000 letters of protest was this proposal slightly altered (primarily by excluding older schools, so as to eliminate Catholic, Jewish and Lutheran opposition),[11] but the basic concept of presumption of guilt was retained.

While the Justice Department attorneys have been vigorous in their advocacy, their defense has been addressed to the *procedure* contended for by plaintiffs, *viz.* relief by court injunction, and not to the substantive result sought by plaintiffs—*viz.* a tax regulation creating a presumption of guilt.

So closely allied are the plaintiffs' and government's substantive positions that the government suggested to the district court that it might declare unconstitutional the Ashbrook and Dornan amendments which quashed the proposed IRS Revenue Procedure, or that it might "interpret the [Ashbrook and Dornan] riders narrowly, so as to permit the implementation of new,

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[11] See statement of Congressman Hyde, 126 Cong. Rec. H 7216 (daily ed. Aug. 19, 1980).

more stringent rules in this area, when ordered by a court."[12]

This tactic has led to bitter denunciation in Congress of the government's role in this case. Congressman Crane, in the third debate on the passage of the Ashbrook and Dornan Amendments, said:

> "I have discovered a far more intriguing scheme for bureaucratic abuse of power than I had previously suspected. What has emerged is a very clear picture of collusive litigation in which the IRS is the defendant. The IRS has acted to promote the interests of the Green and Wright plaintiffs who were suing the agency. Instead of properly defending its case in order to win, the IRS suggested legal arguments in Federal court that would cause it to lose, and be ordered to implement the same type of regulations that Congress has prohibited."

127 Cong. Rec. H 5394 (daily ed. July 30, 1981)[13]

The potential for abuse in "friendly" suits between uninjured citizens and government agencies to accomplish policy changes not endorsed by Congress is a matter which urgently needs review by this Court. This litigation provides a classic example of such community of interest on both sides of the case.

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[12] Response of Defendants To Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion To Dismiss . . .

[13] Similar charges have been made in Congress concerning a companion case, *Green* v. *Miller*, No. 1355-69 (D.D.C.) formerly *Green* v. *Connally*, which is still on trial in the district court. 127 Cong. Rec. H 5394 (daily ed. July 30, 1981) in which the case was termed "sweetheart litigation."

CONCLUSION

The opinion of the Court of Appeals, over a strong dissent, has, for the first time in history, expressly revoked the longstanding principle that a litigant must show actual injury before he can be accorded standing to sue in a federal court.

Furthermore, the court carves out a favored class of people—black litigants with civil rights complaints—and accords them access to the courts which would be denied to other citizens, as Judge Tamm's dissent points out.

So controversial is the opinion that the court itself has expressed the "need [for] Supreme Court guidance" on the questions involved.

For all the reasons expressed in this petition, petitioner respectfully prays that the Court grant certiorari and reverse the opinion of the Court of Appeals and reinstate the judgment of the district court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, et al., *Plaintiffs*

v.

G. WILLIAM MILLER, et al., *Defendants*

OPINION

Filed November 26, 1979

This is an action brought by parents of 25 black school children who attend public school in seven states, representing a nationwide class of "several million individuals." Oral Argument, November 20, 1979. Plaintiffs maintain that Internal Revenue Service Regulations, promulgated pursuant to § 501(a) of the Internal Revenue Code, afford unlawful support to discrimination by granting tax exemptions to discriminatory private schools and tax deductions for gifts to such schools. Plaintiffs claim that by recognizing the schools as exempt from federal taxation, the defendants have facilitated the development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Complaint, ¶ 48. Plaintiffs further allege that the regulations permit schools to receive tax exemptions merely on the basis of adopting and certifying—but not implementing—a policy of nondiscrimination, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S. Code § 2000d), the Civil Rights Act of 1866 (42 U.S. Code § 1981), and the Fifth and Fourteenth Amendments to the United States Constitution.

Plaintiffs seek declaratory and injunctive relief requiring defendants to deny all applications for tax exempt status for, and to revoke all tax exemptions now held by, all private schools, or the organizations that operate them, which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which:

(a) were established or expanded at or about the time the public school districts in which they are located or which they serve began desegregating; *or*

(b) have been determined in adversary judicial or administrative proceedings to be racially segregated; *or*

(c) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems. Complaint, ¶4.

On August 22, 1978, the Internal Revenue Service Published in the Federal Register a proposed modification of current procedures (43 Fed. Reg. 37296). In response to public outcry against the proposed modifications, the Internal Revenue Service (hereinafter, "IRS") modified its original proposal and submitted it for public comment on February 9, 1979. On September 29, 1979, the 1980 General Appropriations Act became law. Included in this legislation were amendments (hereinafter, "Ashbrook and Dornan Amendments") expressly forbidding the use of any funds for the "formulation or carrying out" of the February 9, 1979 IRS proposed guidelines. This action effectively retains, at least for one year, Revenue Procedure 75-50. This is the regulation attacked plaintiffs as "inadequate to insure complaince with the Internal Revenue Code" and therefore "legally insufficient." Complaint, ¶2.

For the following reasons, defendant's Motion to Dismiss is granted and the "*Wright* component"[1] of the case is dismissed in its entirety with prejudice: (A) the *Wright plaintiffs* lack standing to assert their claims; (B) the action of the *Wright* plaintiffs is barred by the doctrine of nonreviewability; (C) recent Congressional action suggests that this Court should not fashion a remedy for the *Wright* plaintiffs. This Court concludes that each reason is, in and of itself, a sufficient justification for dismissal of plaintiffs' action. Therefore, this Court finds it unnecessary to consider the issues of (1) state action; (2) sovereign immunity; (3) the applicability of Title VII of the 1964 Civil Rights Act; and (4) the applicability of the "indespensible party" Rule 19 of the Federal Rules of Civil Procedure.

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[1] This dismissal does not affect the status of the "*Green* component" of the case (formerly C.A. 69-1355, consolidated with *Wright* on August 5, 1977). Though the cases are technically consolidated, the "jurisdictional" arguments which justify dismissal in *Wright* are irrelevant to the remaining issue in *Green*. This is true for two reasons. First, Judge Waddy explicitly denied the *Green* Motion to Dismiss on May 25, 1977 (before the cases were consolidated) rejecting, among other issues, the "jurisdictional" arguments. Second, on June 30, 1971, a three judge court enjoined the IRS from granting final exemption rulings to Mississippi schools until it supplemented the steps it had previously taken. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). In issuing the injunction, the Court affirmed the standing of the *Green* plaintiffs to assert their claims, noting that: ". . . They have standing to attack the constitutionality of statutory provisions which they claim provide an unconstitutional system of benefits and matching grants that fosters and supports a system of segregated private schools . . ." On March 9, 1979 it was ordered that the remaining issue in *Green* be limited to whether or not defendants have complied with the injunction issued in 1971 by the three judge court.

A.

The Wright Plaintiffs Lack Standing to Assert Their Claims

Though the recent case law of standing is so dynamic and expansive as to almost defy codification, it appears to the Court that a claimant must *independently* satisfy each of four criteria in order to maintain standing to assert its claim. First, the claimant must assert a distinct, palpable, and concrete injury. Second, this injury must be fairly traceable to defendant's actions. Third, there must be a sufficient degree of certainty that the relief requested will remove the injury. Fourth, there must exist a sufficient degree of concrete adverseness between the plaintiff and defendant. In the instant case, the parents of the 25 black public school children must satisfy each criteria to maintain this action. It is the conclusion of this Court that they satisfy none of the criteria.

1. Plaintiffs fail to assert a distinct, palpable, and concrete injury.

In *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974), the Supreme Court noted that, "Concrete injury, whether actual or threatened is an indespensible element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution . . ." It is not sufficient that the plaintiff desires "sweeping relief" or that the parties have shared conflicting views and interests. There must be a distinct, palpable, and concrete injury.

Plaintiffs maintain that the IRS Regulations, as currently structured and administered, present two related injuries. First, the granting of tax exemptions to segregated schools invades plaintiffs' Constitutional right to be free of government aid to and involvement with racial discrimination. Plaintiffs argue that *Norwood* v. *Harrison*, 413 U.S. 455 (1973). *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969), *Gilmore* v. *City of Montgomery*, 473 F.2d 832 (5th Cir. 1973), reversed in part on

other grounds, 417 U.S. 556 (1974), and *Green* v. *Connally*, *supra*, support the proposition that Title VII of the Civil Rights Act of 1964 establishes a "right to be free from government aid to segregation." Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 22. Second, plaintiffs allege that the IRS Regulations cause injury by subverting plaintiffs' right to Constitutionally mandated public school desegregation by enhancing the degree to which discriminatory private schools can provide a haven for white children avoiding desegregating public schools.

While each of these harms is theoretically plausible, there is no allegation in the record before the Court that the "target schools" [2] are actually discriminating in viola-

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[2] The complaint names only the Secretary of the Treasury and the Commissioner of Internal Revenue as defendants. However, the complaint cites a number of schools as "examples" of unconstitutional IRS regulation and enforcement policy. "Private schools which are the subject of this complaint are those schools which have insubstantial or nonexistent minority enrollments and which are located in or serve desegregating public school districts." Complaint, ¶ 23. The complaint names a number of these "target schools": Harding Academy, Southern Baptist Schools of Whitehaven, and Briarcrest Baptist School System, Memphis, Tennessee; Montgomery Academy and St. James Parish School, Montgomery, Alabama; Prince Edward Academy, Prince Edward County, Virginia; Camelot Parochial School, Cairo, Illinois; Sea Pines Academy, Beaufort County, South Carolina; Bowman Academy and Holly Hill Academy, Orangeburg, South Carolina; River Oaks School, Monroe, Louisiana; Tallulah Academy and Delta Christian Academy, Madison Parish, Louisiana; Natchitoches Academy, Natchitoches Parish, Louisiana; Hyde Park Academy, South Boston Heights Academy, and Parkway Academy, Boston, Massachusetts.

The complaint is also designed to include "thousands of other racially segregated independent private schools which operate in or serve desegregated public school districts and which have received, applied for or will apply for, federal tax exemption."

tion of the Constitution or federal law. If such an allegation were proven, this Court would have no difficulty ordering an end to the discrimination by the offending school, for the Supreme Court has forcefully held that no private school has any right at law to exclude, or otherwide discriminate against, Negroes on the ground of race. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Thus, plaintiffs are in a dilemma in their attempt to satisfy the distinct, palpable, and concrete injury criteria for standing. If plaintiffs can prove that a private school is discriminating in direct contravention of the Constitution and federal law, such discrimination is redressable through an ordinary lawsuit in an adversary context filed directly against the offending school. If, on the other hand, plaintiffs cannot prove such discrimination, they have failed to assert a distinct, palpable, and concrete injury and thus lack the requisite standing to assert their claims.

2. *Even if plaintiffs assert a distinct, palpable, and concrete injury, the injury is not fairly traceable to the actions of the defendants.*

If the plaintiff parents of 25 black public school children are injured, the injury is caused by the offending "target" private schools who are *not* parties to this action. There is no sufficient casual nexus between the plaintiffs' injury and the *named* defendants' regulations.

In *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 426 U.S. 26 (1976), certain indigents sued the Commissioner of Internal Revenue in a format closely parallel to the instant case. They asserted the illegality of a Reve-

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Complaint, ¶ 19. Furthermore, plaintiffs argue that "it has been estimated that there are more than 3500 racially segregated private academies operating in the country having a total enrollment of more than 750,000 children." Plaintiffs' Motion for Class Certification at 2.

nue Ruling allowing tax exemptions to hospitals who offered only minimum services free to indigents. The Supreme Court dismissed for lack of standing, emphasizing that where the injury alleged by plaintiffs resulted only indirectly from the challenged action of defendant IRS, this indirectness "may make it substantially more difficult to meet the minimum case and controversy requirements of Article III." *Id.*, at 45. In *Eastern Kentucky, supra*, the Supreme Court made the "nexus test" extremely difficult for those whose tax liability is not directly affected. Justice Stewart, concurring in *Eastern Kentucky, supra*, commented that, "I cannot imagine a case, at least outside of the First Amendment area, where a person whose own tax liability was not affected could ever have standing to litigate the federal tax liability of someone else." 426 U.S. at 46. This Court finds that this is not such a case.

Two cases in this Circuit have employed similar analysis to deny standing where only an indirect connection is established. In *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), the Court denied standing to an association of travel agents to protest the failure of federal tax authorities to assess taxes on income of the American Jewish Congress derived from the operation of travel programs. In *Tax Analysts* v. *Blumenthal*, 566 F.2d 130 (D.C. 1977), the Court held that a small oil well operator had no standing to sue the Secretary of the Treasury for a declaratory judgment that certain tax credits granted to American oil companies for payments to foreign nations were contrary to the Internal Revenue Code. The plaintiffs argue that both cases involve a different *type* of injury than that incurred by the parents of the 25 black public school children. However, these cases stand for the proposition that, *regardless of the nature of the particular injury*, a third party is too indirectly affected to litigate the tax liability of another party. In such a case, and as is the case here, the injury is not fairly traceable to the actions of the defendants.

3. *Even if the plaintiffs satisfied criteria 1 and 2, plaintiffs lack standing because there is a sufficient degree of speculativeness that the relief requested will remedy the injury.*

Presently, the IRS Regulations are based on an underlying policy that tax exemptions may not be granted to discriminatory private schools. Significant steps have been taken to implement this policy. In accordance with the 1971 Order in *Green* v. *Connally*, *supra*, the IRS promulgated Rev. Proc. 72-54 which required, in summary, that private schools adopt and administer in good faith a policy of nondiscrimination and publicize this policy to all racial segments of the community which they served. Defendants in 1975 proposed more detailed and stringent guidelines and, after receiving comments from approximately 100 educational institutions and other interested parties, published the guidelines in final form as Rev. Proc. 75-50. This document sets forth the current administrative enforcement standards which defendants require all private schools to meet in order to demonstrate that they have nondiscriminatory policies and that they implement these policies in good faith. Each school is required to respond under penalty of perjury.[3]

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[3] In summary, the Rev. Proc. requires exempt private schools to meet the following requirements:

(1) The schools must formally state their nondiscriminatory policy in their organizational charter or similar instrument (Rev. Proc. 75-50, Sec. 4.01).

(2) The schools must set forth that policy in all brochures, advertisements, catalogues, fund solicitations and similar publications (Sec. 4.03);

(3) The schools must either effectively publish that policy under specified, detailed guidelines in newspapers (Sec. 4.03-1 (a)), or broadcast media (Sec. 4.03-1(b)); or, in the alternative, they must be able to demonstrate that they in fact have a significant minority enrollment or have meaningfully sought to recruit such an enrollment (Sec. 4.03-2);

(4) The schools must have a nondiscriminatory policy with

On the surface, plaintiffs' proposed guidelines appear to be significantly different than the current IRS procedure in that they shift the burden of proof onto the private schools to establish their innocence *after* their exemptions have been withdrawn by the IRS. The plaintiffs' proposed guidelines require all "badge of doubt" schools (to be determined by plaintiffs' three criteria, see p. 2, *supra*) to overcome a presumption of guilt. However, the record provides absolutely no indication that the criteria that the IRS would employ under plaintiffs' proposed remedy would be any different than those which are employed currently. Hence, it is purely speculative whether, in the final analysis, any fewer schools would be granted tax exemptions under plaintiffs' system than under the current IRS system.

Furthermore, even it it were reasonable to assume that fewer exemptions would be available to "target" private schools under plaintiffs' proposed guidelines, it is purely speculative that loss of these exemptions would produce any net change in the desegregation of a given school district (the second injury asserted by plaintiffs). It is by no

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respect to faculty, school programs, and tuition and scholarship practices (Secs. 4.04, 4.05);

(5) They must certify all of the above under penalty of perjury (Sec. 4.06);

(6) The schools must provide specified information to defendants regarding the racial composition of their faculty and staff, the nondiscriminatory character of their tuition and scholarship policies, and the policies regarding race discrimination held by their incorporators, founders, board, and donors (Sec. 5.01-1 through 5.01-4; see also Secs. 4.07, 4.08); and

(7) The schools must keep records for three years periods from the year of compilation regarding racial composition of faculty and students, nondiscrimination in scholarship and tuition, and as well as retaining copies of all brochures, catalogues, and the like (Sec. 7).

means clear that these schools would not elect to forego the exemption in question rather than end any discriminatory conduct. It appears probable that many such schools have only limited dependence on these exemptions, indeed, even assuming substantial dependence, the schools might well choose to compensate by alternate means for financial benefits otherwise available from the exemptions. Clearly, under law firmly established by *Eastern Kentucky, supra*, plaintiffs lack standing because there is a sufficient degree of speculativeness that the relief requested will remedy the injury claimed by plaintiffs.

4. *Even if plaintiffs satisfied criteria 1, 2, and 3, plaintiffs lack the necessary concrete adverseness to satisfy the case and controversy requirement of Article III.*

Under plaintiffs' proposed guidelines, all "target" schools would presumptively lose their tax exempt status until such time as they could prove to the IRS that they are not discriminating. If plaintiffs were to prevail, as of the day of the decree each of the 3500 "target" schools would lose legal rights to their exemption and deductibility status. Notwithstanding the ability of the schools to subsequently prove that they are within the law, they are not made parties to *this particular action*. Plaintiffs would deprive these schools of their valuable tax exempt status without ever giving the affected schools a day in court.

The defendant IRS, on the other hand, seems to have nothing to lose if it were forced to grant less tax exemptions to private schools. In fact, this Court observes that the named adversary parties in this action the parents of the black public school children and the Internal Revenue Service, seem closely allied in terms of the need to promulgate future guidelines.

In *Baker* v. *Carr*, 309 U.S. 186 (1961), the Supreme Court held that both parties must have "such a personal stake in the outcome of the controversy as to assure that concrete

adverseness which sharpens the presentation of issues upon which the court so largely depends . . ." 309 U.S., at 204. Thus, the standing question in its Article III aspect "is whether the plaintiff has alleged 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original).

Given the present posture of the case, the complaint does not present a question in the adversary context, or in a form historically viewed as capable of judicial resolution. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

B.

The Action of the Wright Plaintiffs Is Barred by the Doctrine of Nonreviewability

Since an accurate assessment of plaintiffs' action would require this Court to undertake detailed or continuing review of a generalized IRS enforcement program, or to review complex issues of tax enforcement policy and of agency resource allocation, this Court holds that this instant suit is barred by the doctrine of nonreviewability.

Ever since the IRS issued regulations in response to *Green* v. *Connally*, *supra*, (40 Fed. Reg. 53409), the issue of their proper implementation and enforcement has been "a terribly complex and difficult problem." Oral Argument, November 20, 1979. There have been lengthy administrative hearings and "over 100,000 written comments" (Oral Argument, November 20, 1979) concerning the two subsequent sets of modified regulations.[4] The September 29, 1979 passage of the Ashbrook and Dornan Amendments to the 1980 General Appropriations Act has had the effect of retaining the Present Rev. Proc. 75-50 for at least one more

[4] See p. 8, *supra*, for a more thorough discussion of the considerable IRS regulatory and enforcement activities.

year. Currently, therefore, the IRS regulatory scenario is in a significant state of flux. Since the parties admit that the present guidelines are in some way inadequate, the dispute seems to involve a choice among a number of proposed guidelines. Presented with this factual situation, this Court concludes that it would be inappropriate for it to fashion relief in this case. Such action would be tantamount to this Court becoming a "shadow commissioner of Internal Revenue" to run the administration of tax assessments to private schools in the United States. It is clearly inappropriate and unjustifiable for a federal court to become the administrator of a nationwide tax enforcement program.

Plaintiff proposes that this Court require the IRS to implement three guidelines which the IRS would therefore be bound to administer and enforce. In order to assess the viability of IRS implementation and enforcement efforts, this Court would be required to analyze results from a significant number of schools. Even if, as plaintiffs contend, the Court need examine only a "representative number" of schools to gauge compliance, the effort would be unfathomable. The thrust of the complaint is that there are "thousands of . . . racially segregated independent private schools which operate in or serve desegregating public school districts." Complaint, 120. Plaintiff further contends that there are more than 3,500 racially segregated private academies operating in the country having a total enrollment of more than 750,000 children. Complaint, 120. It is clear that such review would impose grave burdens on this Court's resources and would require the Court to exercise an extensive administrative expertise and to involve itself deeply in defendants' practical day-to-day operations.

Application of this doctrine of nonreviewability entails an analysis of the pragmatic consequences for the court itself and for the affected agency likely to result from the review being sought. *Panama Canal Co. v. Grace Line,* 356 U.S. 309 (1958). (Holding nonreviewable certain complex technical issues regarding the application of the statutory

formula for fixing canal tolls to particular facts and cost accounting methods). Applying this standard to a factual situation similar to this case, the District Court for this district ruled that it would not review the IRS assessment of taxes on income of the American Jewish Congress derived from the operation of travel programs. *American Society of Travel Agents v. Blumenthal*, 75-1 U.S.T.C. 87,289 ¶ 9484 (D.C.D.C. 1975). By memorandum order, the Court observed that, "Plaintiffs are in effect asking the Court to substitute its discretion for that of the Internal Revenue Service in determining which travel programs of tax exempt organizations qualify for tax exemptions. . . . This is the kind of review which courts traditionally decline to undertake. The court's jurisdiction may be invoked to check a specific abuse of discretion by the Internal Revenue Service. . . . But it may not be invoked to undertake continuing supervision of the IRS's administration of the Internal Revenue Code." *Id.*, at 87,290.

Plaintiffs cite a line of cases supporting the proposition that courts are required to review agency action when the harm involved is a "fundamental, Constitutional" one. *Johnson v. Robison*, 415 U.S. 361 (1973), *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). In the instant case, however, the issue is not *whether* review is possible. Rather, the core issue concerns the *type* of review that is appropriate, feasible, and consistent with the doctrine of nonreviewability. This Court submits that any violation of the Constitution or federal law by a discriminating school should be remedied on a case-by-case basis through a lawsuit filed directly against the offending school.

C.

Recent Congressional Action Suggests That This Court Should Not Fashion a Remedy for the Wright Plaintiffs

On September 29, 1979, the General Appropriations Act of 1980 (P.L. 96-74) became law. Section 615 of the Act,

known as the Dornan rider, provides as follows: "None of the funds available under this Act may be used to carry out proposed revenue procedure 4830-10-M of the Internal Revenue Service entitled 'Proposed Revenue Procedure on Private Tax-Exempt Schools' (44 F.R. 9451 through 9455, February 13, 1979, F.R. Document 79-4801), and proposed revenue procedure entitled 'Proposed Revenue Procedure on Tax Exempt Schools' (43 F.R. 37296 through 37298, August 22, 1978, F.R. Document 78-23515), or parts thereof." Section 103 of the Act, known as the Ashbrook rider, is much broader, and provides as follows: "None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." The effect of this recent action is to retain in effect, at least until September, 1980, the presently effective Rev. Proc. 75-50, which is the regulation attacked by plaintiffs as inadequate to insure compliance with the Internal Revenue Code and therefore "legally insufficient." Complaint, ¶ 23.

This Court agrees that the Ashbrook and Dornan Amendments provide "a complete and total refutation of the contention . . . that existing regulations are legally insufficient, and that Section 501(c)(3) of the Internal Revenue Code requires adoption of the presumed-guilty-until-proven-innocent approach which requires of private schools "proofs of non-discrimination . . ." Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion to Dismiss at 4. Congress has absolutely forbidden the IRS from adopting *any* new regulations concerning the tax-exempt status of private schools. If plaintiffs were to be granted the relief they seek in this case, it would be completely contrary to Congressional intent and policy. The actions by Congress are the strongest possible expres-

sions of the Congressional intent that Section 501(c)(3) of the Internal Revenue Code is not susceptible of the construction which plaintiffs would place upon it in this case.

As plaintiffs contend, the legislative history of the Ashbrook and Dornan Amendments apparently *allows* a federal court to fashion a remedy in this area. However, this Court maintains that, in such an area ripe with legislative history and government regulation,[5] it is not the business of a federal court to explicitly thwart the will of Congress or to otherwise fail to carry it out. This Court declines to fashion such a remedy.

In conclusion, this Court is of the opinion that (A) the *Wright* plaintiffs lack standing to assert their claims; (B) the action of the *Wright* plaintiffs is barred by the doctrine of nonreviewability; and (C) recent Congressional action suggests that this Court should not fashion a remedy for the *Wright* plaintiffs. Accordingly, the plaintiffs involved in the "*Wright* component" of the litigation are dismissed and judgment will be entered in favor of the defendants.

/s/ George L. Hart, Jr.
George L. Hart, Jr.
United States District Judge

November 26, 1979.

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[5] See p. 8, *supra*, for a discussion of appropriate regulatory history.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1124

INEZ WRIGHT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT, AND EPHRON ANTONI WRIGHT, JR., ET AL., APPELLANTS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 76-1426)

Argued February 17, 1981

Decided June 18, 1981

Robert H. Kapp, with whom *Arthur J. Rothkopf*, *Sara-Ann Determan*, *Paul L. Joffe*, *Richard S. Kohn*, *William L. Robinson*, *Norman J. Chachkin*, *William E.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Caldwell, Richard Fields, James M. Nabrit, III, Bill Lann Lee, and *Armand G. Derfner*, were on the brief for appellants. *Frank R. Parker* also entered an appearance for appellants.

Robert S. Pomerance, Attorney, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General (at the time the brief was filed), *John F. Murray*, Acting Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, *Michael L. Paup*, and *Ernest J. Brown*, Attorneys, Department of Justice, were on the brief, for federal appellees. *William A. Freidlander*, Attorney, Department of Justice, also entered an appearance for federal appellees.

George E. Morrow for appellee Allen.

Before: WRIGHT, TAMM and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* TAMM.

GINSBURG, *Circuit Judge*: This action charges the Internal Revenue Service with failure to fulfill its obligation to confine tax exemption under section 501(c)(3) of the Internal Revenue Code to private schools that operate on a racially nondiscriminatory basis.[1] It was

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[1] Under section 501(c)(3) of the Internal Revenue Code, implemented by § 501(a), corporations "organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes" are exempt from federal income taxation. Such organizations are also exempt from federal social security taxes (FICA), I.R.C. § 3121(b)(8)(B), and from federal unemployment taxes (FUTA), I.R.C. § 3306(c)(8). Since a private school's "income" often does not exceed deductible expenses, the primary benefit of tax-exempt status derives from § 170, which permits donors to deduct contributions to exempt organizations from gross income. Such contributions are also deductible for federal estate and gift tax purposes under §§ 2055 and 2522. For discussion of the importance of tax-deductible contributions to private schools,

initiated in 1976 by parents of black children attending public schools in desegregating districts in several states. Nationwide relief is sought. The case is companion to *Green v. Miller*, No. 1355-69 (D.D.C.). *Green* was instituted in 1969 and reopened in 1976; relief requested in *Green* is limited to schools in Mississippi. In April 1977 the district court ordered the two actions consolidated. *Green v. Miller*, No. 1355-69 (D.D.C. Apr. 5, 1977), Joint Appendix (J.A.) 48-50. In November 1979 that court dismissed the *Wright* component of the consolidated action as nonjusticiable. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979). Six months later, the district court issued an order and permanent injunction in *Green* granting in significant part the relief requested in that action. *Green v. Miller*, No. 1355-69 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980).

In this appeal plaintiffs' standing to sue is the dominant issue. In addition to concluding that plaintiffs lacked standing, the district court also determined that deference to the Internal Revenue Service and to Congress portended against judicial review. We conclude that the district court erred in dismissing the case on the grounds asserted; we therefore remand for further proceedings.[2] To place the issues before us in context, we describe at the outset the course of proceedings, first in *Green*, then in this case. Thereafter, we discuss in turn the three reasons the district court supplied for dismissing the complaint.

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see Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 302 (1979) [hereinafter cited as *Hearings*] (testimony of William B. Ball); *id.* at 388-89 (testimony of W. Wayne Allen, Chairman of the Board, Briarcrest School System); *id.* at 400 (statement of John Esty, Jr., Pres., Nat'l Ass'n of Independent Schools).

[2] We decline to address in the first instance other issues raised before, but not yet considered by, the district court.

I. THE *Green* AND *Wright* CASE HISTORIES

In 1969, when the *Green* litigation commenced, the IRS accorded tax-exempt status to racially discriminatory private schools so long as the schools were not receiving state aid. *See Green v. Kennedy*, 309 F. Supp. 1127, 1130 (D.D.C.) (three-judge court), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970); *Hearings*, *supra* note 1, at 3 (statement of Jerome Kurtz, Commissioner of Internal Revenue). The *Green* plaintiffs, black parents and their minor children attending public schools in Mississippi, sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from according tax exemption to private schools in Mississippi "from which Negro students are excluded on the basis of color." 309 F. Supp. at 1130. In response to the plaintiffs' motion for a preliminary injunction, the three-judge district court empaneled to hear *Green*[3] restrained the defendants "from issuing further ruling letters under sections 170(c) and 501(c) of the Internal Revenue Code to private schools in Mississippi unless they have affirmatively determined on the basis of adequate investigation that the applicant school does not discriminate against Negroes in its admissions policy." 309 F. Supp. at 1131. Before setting out the considerations that warranted *pendente lite* injunctive relief, the court dealt summarily with the defendants' assertion that the plaintiffs lacked standing to maintain the suit:

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[3] The plaintiffs asserted that the Internal Revenue Code was unconstitutional to the extent that it authorized the Service to grant tax-exempt status to segregated schools. Green v. Kennedy, 309 F. Supp. at 1131. At that time 28 U.S.C. § 2282 provided that only a three-judge court composed under then § 2284 could issue an injunction "restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution." Section 2282 has since been repealed. Act of August 12, 1976, Pub. L. No. 94-381, § 2, 90 Stat. 1119.

> We take note of defendants' contention that plaintiffs have no standing to bring this action in their capacity as taxpayers. We need not consider that issue at this juncture. This case is properly maintained as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, by Negro school children in Mississippi and the parents of those children on behalf of themselves and all persons similarly situated. They have standing to attack the constitutionality of statutory provisions which they claim provides [*sic*] an unconstitutional system of benefits and matching grants that fosters and supports a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools.

Id. at 1132.

Prior to further disposition by the court, the Service changed its position. It announced that racially discriminatory private schools are not entitled to tax exemption.[4] A sharp adversary contest remained, however, between plaintiffs and intervenors, a class of parents and children who supported or attended private schools in Mississippi with an enrollment limited to members of the white race. *See Green v. Connally*, 330 F. Supp. 1150, 1155 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

In June 1971, the court decided *Green* on the merits; granting plaintiffs both declaratory relief and a permanent injunction, the court held that "the Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools." *Green v. Connally*, 330 F. Supp. at 1156. The court noted that section 501(c)(3) does not expressly

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[4] IRS News Release (July 10, 1970), *reprinted in Hearings, supra* note 1, at 10.

so mandate. It then discussed evolving case law governing charitable and educational trusts. Ultimately, however, the court did not rest upon common-law developments. Instead, it determined that the Internal Revenue Code exemption provisions must be read in a manner harmonious with federal civil rights legislation and the overriding national policy against racial discrimination in educational facilities. A contrary reading, the court emphasized, would raise "serious constitutional questions":

> Clearly the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would be difficult indeed to establish that such support can be provided consistently with the Constitution.

330 F. Supp. at 1164-65.[5]

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[5] Plaintiffs' standing, questioned prior to issuance of the preliminary injunction, was not further addressed at this stage of the litigation. The court treated comprehensively, however, objections pressed by intervenors based on First Amendment freedom of association concerns that related to the right to educate one's child in a school of the parent's choice, whether public, private, or parochial. 330 F. Supp. at 1165-69. *Cf.* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 76 (1972) (distinguishing between segregated schools and other segregated private associations on the ground that racially restricted education, public or private, contravenes overriding public policy). With respect to the relative strength of countervailing freedom of association interests, *compare* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (private schools), *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting) (private clubs).

The injunction ordered in *Green* in June 1971 barred the Service from granting tax exemption to any private school in Mississippi unless the school adopted a racially nondiscriminatory policy as to students and gave meaningful notice to the community concerning that policy. Further, the injunction required schools seeking exemption to supply the Service with information as to (1) the racial composition of students, faculty, staff, and applicants for admission; (2) recipients of scholarship and loan funds; and (3) the school's organizers, board members, and donors of land and buildings. 330 F. Supp. at 1179-80. The nature of the class action, the court noted, accounted for a decree limited to schools in Mississippi. The court added, however, that "[t]he Service would be within its authority in including similar requirements for all schools of the nation." *Id.* at 1176. More particularly, the court stated:

> To obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi . . . .

Id. at 1174.

After the Supreme Court summarily affirmed the three-judge district court decision in *Green v. Conally*,[6] the Service adopted guidelines, applicable nationwide, to assist it in determining whether schools seeking or holding exempt status are in fact discriminatory.[7] The IRS

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[6] Coit v. Green, 404 U.S. 997 (1971). The appeal was pursued by the intervenors. *See* note 29 *infra*.

[7] *See particularly* Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587.

One section of the current IRS guidelines, Rev. Proc. 75-50, § 8, makes special reference to Mississippi:

guidelines, as published in 1975, were criticized by the U.S. Commission on Civil Rights as inadequate to identify racially discriminatory schools.[8] Ultimately, the Service acknowledged that the procedures in place since 1975 were "ineffective in identifying schools which in actual operation discriminate against minority students, even though the schools may profess an open enrollment policy and comply with the [IRS] yearly publication requirement."[9]

On July 23, 1976, the *Green* plaintiffs reopened that case, asserting that the Service was not complying with the court's continuing injunction against tax exemption for racially discriminatory private schools in Mississippi. In particular, the plaintiffs sought to compel the Service to withdraw tax-exempt status from, and refuse to grant it to,

> all Mississippi private schools or the organizations which operate them, which:
>
> (1) have been determined in adversary judicial or administrative proceedings to be racially discriminatory; or

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Mississippi Schools

The United States District Court for the District of Columbia has ordered specific guidelines and recordkeeping requirements for Mississippi private schools. *Green v. Connally*, 330 F. Supp. 1150, *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). To the extent that the requirements of the Court's Order vary from the guidelines and recordkeeping requirements set forth in this Revenue Procedure, the Court's Order is controlling for Mississippi schools.

1975-2 C.B. at 590.

[8] *See Hearings, supra* note 1, at 236-51 (letter and attachments from Arthur S. Flemming to Jerome Kurtz). The Civil Rights Division of the Department of Justice had suggested stronger language for the proposed IRS guidelines and later criticized the final guidelines as ineffective. *Id.* at 1181-82, 1187-91 (statement of James P. Turner).

[9] *Hearings, supra* note 1, at 5 (statement of Jerome Kurtz).

> (2) which have insubstantial minority enrollments, which are located in or serve desegregating public school districts, and which either (i) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, or (ii) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems.[10]

One week later, this action commenced. Inez Wright, the mother of four black children attending public schools in Memphis, Tennessee, and a number of other similarly situated parents in eight states across the country filed a complaint in the district court, individually, on behalf of their minor children, and as representatives of a class, seeking relief on a nationwide basis similar to that sought with respect to Mississippi in the reopened *Green* case. Complaint at 3-4, J.A. 11-12. In April 1977, on motion of plaintiffs in both cases, the court consolidated the *Green* and *Wright* actions "inasmuch as [they] involve common questions of law and fact." J.A. 49. This action then became known as the "*Wright* component" of the consolidated proceedings. In May 1977, W. Wayne Allen, Chairman of the Board of Trustees of the Briarcrest School System in Memphis, was granted leave to intervene in *Wright*. Intervenor Allen pointed out that Briarcrest was one of the private schools specifically mentioned in the *Wright* complaint as a "segregated academy." He participated in *Wright* as a parent who has chosen to send his children to Briarcrest and as a contributor to that private school system who deducts the contributions on his federal income tax returns. J.A. 41-44; Brief for Intervenor-Appellee at 5-6.

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[10] Motion to Enforce Decree and for Further Declaratory and Injunctive Relief at 7 (July 23, 1976), Green v. Miller.

Prompted by the *Green* and *Wright* lawsuits, the Service reviewed its procedures and concluded that more specific guidelines were needed to determine whether the "actual practice" of certain schools "conformed to their asserted policies."[11] In August 1978, the Service published proposed new procedures for review of a school's racial policy.[12] After receiving written comments and conducting public hearings on the proposal, the Service, in February 1979, published a revised version.[13] The proposed guidelines, as revised, deal primarily with two classes of private elementary and secondary schools —those adjudicated discriminatory in nontax cases, and those with insignificant minority enrollment whose formation or substantial expansion is related to public school desegregation in the community.[14] Such schools "would have been required to make special showings to rebut the indications of racial discrimination."[15]

Effective October 1, 1979, further IRS action was stayed by Congress through amendments to the Treasury Appropriations Act of 1980.[16] Two riders deal with the issue. One, known as the Dornan amendment,[17] deals specifically with the IRS guidelines proposed in August 1978 and February 1979; it provides that "[n]one of

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[11] *Hearings, supra* note 1, at 6 (statement of Jerome Kurtz).

[12] 43 Fed. Reg. 37296 (Aug. 22, 1978), *reprinted in Hearings, supra* note 1, at 21.

[13] 44 Fed. Reg. 9451 (Feb. 13, 1979), *reprinted in Hearings, supra* note 1, at 41.

[14] *Hearings, supra* note 1, at 6-7 (statement of Jerome Kurtz).

[15] *Id.* at 6.

[16] Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979).

[17] *Id.* § 615.

the funds available under [the] Act may be used to carry out [the IRS proposals]." The other, known as the Ashbrook amendment,[18] provides more generally that none of the funds furnished pursuant to the Act shall be used for measures, other than those then in effect, that "would cause the loss of tax-exempt status to private, religious, or church-operated schools."[19]

Thereafter, on November 26, 1979, the district judge dismissed this action, the *Wright* component of the consolidated proceedings, stating three grounds, each sufficient in his judgment to warrant the dismissal: first, the *Wright* plaintiffs lacked standing; second, the action was barred by "the doctrine of nonreviewability"; third, granting the relief requested by the *Wright* plaintiffs would thwart the express will of Congress, manifest in the Ashbrook and Dornan amendments. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979). The same district judge, six months later, entered an order in favor of the plaintiffs in *Green*. The court enjoined the Service from granting tax-exempt status to Mississippi private schools (1) adjudged to be racially discriminatory or (2) established or expanded at the time of local public school desegregation, unless the schools clearly and convincingly demonstrate that "they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs." *Green v. Miller*, No. 1355-69 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980).

The district judge did not supplement his order in *Green* with an opinion reconciling that decree with his dismissal of the *Wright* complaint. Both sets of plaintiffs

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[18] *Id.* § 103.

[19] The restrictions lapsed October 1, 1980, when a new fiscal year opened. They were continued in force, however, until June 5, 1981, under H.R.J. Res. 644, Pub. L. No. 96-536, 94 Stat. 3166 (1980).

sought review of the same agency action (or inaction). The will of Congress, we believe, does not separate Mississippi from the rest of the nation. An objection to standing, raised when *Green* was reopened, was denied without opinion.[20] While only the *Wright* component is before us for review, we note the anomalous result of the district court rulings in the two cases. To obey both court decree and congressional stop order, the Service must apply one set of guidelines to schools in Mississippi and another, less stringent set of procedures to schools outside Mississippi, even schools bearing "the same or similar badge of doubt." [21]

II. Plaintiffs Have Standing to Sue

A. *The District Court's Position*

The district court determined that standing in this case depended on satisfaction of four criteria and that plaintiffs satisfied none of them. First, the court said, plaintiffs asserted no "distinct, palpable, and concrete injury." 480 F. Supp. at 793. Nor could plaintiffs establish such an injury, according to the district court, for they were "in a dilemma":

> If plaintiffs can prove that a private school is discriminating in direct contravention of the Constitution and federal law, such discrimination is redressable through an ordinary lawsuit in an adversary context filed directly against the offend-

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[20] *See* Green v. Miller, No. 1355-69 (D.D.C. May 25, 1971) (order denying motion to dismiss). The district court apparently considered the objection foreclosed by prior proceedings in *Green*. *See* Hearing Transcript of May 17, 1977, at 35, 106-07. *See also* text following note 50 *infra*.

[21] Green v. Connally, 330 F. Supp. at 1174; *cf.* 126 Cong. Rec. H5193 (daily ed. June 18, 1980) (remarks of Rep. Ashbrook referring to the *Green* and *Wright* dispositions as "contradictory opinions").

> ing school. If, on the other hand, plaintiffs cannot prove such discrimination, they have failed to assert a distinct, palpable, and concrete injury and thus lack the requisite standing to assert their claims.

Id. at 794. Plaintiffs urge that this analysis fits a complaint they did not bring. They maintain they have no interest whatever in enrolling their children in a private school. They assail only government action. The sole injury they claim is the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth. Plaintiffs point out that the district court cited, but did not purport to distinguish, Supreme Court decisions recognizing the standing of black citizens, parents, and schoolchildren to challenge government action on that basis: *Coit v. Green*, 404 U.S. 997 (1971), *aff'g mem. Green v. Connally*, 330 F. Supp. 1150 (D.D.C.); *Norwood v. Harrison*, 413 U.S. 455 (1973); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

Second, assuming the injury plaintiffs complained of was inflicted by private schools that practiced race discrimination, the court concluded that such an injury was not "fairly traceable" to IRS action. For this conclusion, the court relied dominantly on *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Again, plaintiffs insist, the court misidentified their grievance. *Eastern Kentucky* might well control, they concede, were they endeavoring to gain access to the private schools. But that is not what they want. Rather, plaintiffs repeat, they seek to stop government from bestowing any advantage on an educational facility that contributes to the perpetuation of racial discrimination in the localities in which they reside.

Third, the district court stated that it was "purely speculative" whether the relief requested would redress

plaintiffs' injury. 480 F. Supp. at 795-96. The loss of tax exemption might not produce any net change in the public school population; schools might forego exemption rather than end any discriminatory conduct; the procedures plaintiffs proposed might not yield fewer tax exemptions than the system the IRS now employs. Regarding the first two points, once more, plaintiffs say, the injury they assert is not the one the district court describes. The very act by the IRS of according tax exemption to a school that discriminates in their vicinity causes immediate injury to them, plaintiffs maintain, and that is the only injury for which they seek redress.

Concerning the likelihood that invigorated IRS procedures would yield fewer tax exemptions, plaintiffs point out that the district court's dismissal of the case at the threshold precluded any evidentiary submission. They further note that the Commissioner of Internal Revenue had told Congress that existing procedures were "ineffective in identifying schools which in actual operation discriminate against minority students." *Hearings*, *supra* note 1, at 5. Finally, they suggest that the court's action in *Green* contradicts its conclusion in *Wright* about the "speculativeness" of the relief requested. If tighter IRS procedures are not likely to yield fewer tax exemptions, plaintiffs note, it is hard to imagine why the court ordered the Service to adopt such procedures in *Green*.

As a final point, the district court expressed the view that no genuine article III case or controversy existed because the defendant IRS "seems to have nothing to lose if it were forced to grant less tax exemptions to private schools." 480 F. Supp. at 796. The real losers, the court said, would be parties the plaintiffs had not sued, schools "[p]laintiffs would deprive . . . of their valuable tax exempt status." *Id.* Plaintiffs and the Service, the court added, "seem closely allied in terms

of the need to promulgate future guidelines." *Id.* But it was the IRS that defended successfully against this action in the district court. Nor did the Service exhibit any lack of adversary zeal in the briefs and oral argument it presented to this court. Moreover, a strong advocate of the private schools that resist more stringent guidelines is participating in this action as intervenor. We therefore find that the case has the earmarks of a fully adversary contest.

On this point too, *Green* stands in jarring contrast. The posture of the IRS is not different in the two cases. While intervenors originally participated in *Green* and indeed pursued that case in the Supreme Court, no intervenor appears to have participated actively in the reopened *Green* proceeding as intervenor Allen did in *Wright*. Nevertheless, the district court treated *Green* as a genuine case or controversy and, as we recounted earlier, required the Service to tighten its procedures in dealing with Mississippi schools.

B. *Divergent Supreme Court Precedent:* Eastern Kentucky *on the one hand;* Green, Norwood, *and* Gilmore *on the other*

The law of standing has been described as "extraordinarily uneven." [22] In the welter and confusion of case law and commentary, there is one point of clear agreement: "[L]ower courts and practitioners especially need Supreme Court guidance." [23] The guidance the High Court has supplied relevant to the case at hand points

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[22] Davis, *Standing, 1976*, 72 NW. U.L. REV. 69, 69 (1977).

[23] *Id.* at 70; *cf.* Americans United for Separation of Church & State, Inc. v. United States Dep't of Health, Education and Welfare, 619 F.2d 252 (3d Cir. 1980), *cert. granted sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 101 S. Ct. 1345 (1981) (No. 80-327).

in opposite directions. *Simon v. Eastern Kentucky Welfare Rights Organization*, relied upon by the district court, suggests that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges. *Green*, *Norwood*, and *Gilmore*, on the other hand, indicate that black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race discrimination in their communities.

In this opinion, we do not search for a grand solution that will unclutter this area of the law and lead to secure, evenhanded adjudication. Instead, as an intermediate court of review, we select from two divergent lines of Supreme Court decision the one we believe best fits the case before us.

We turn first to *Eastern Kentucky*. There indigents and organizations of indigents challenged a Revenue Ruling discontinuing a requirement that a hospital, to be classified as "charitable" under section 501(c)(3), must provide free or below cost service to indigents to the extent of its financial ability. After the new Ruling, some of the plaintiffs had been denied hospital services on account of their indigency. The Supreme Court held that plaintiffs lacked standing to bring the suit.

Plaintiffs' injury, the Court said, was the denial of hospital service. But plaintiffs could not show that the hospitals' refusal to serve them resulted from the Ruling. "It is purely speculative," the Court declared, "whether the denials of service specified in the complaint fairly can be traced to [the Ruling] or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43. Justice Stewart, concurring, commented: "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever

could have standing to litigate the federal tax liability of someone else." *Id.* at 46.[24]

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[24] After *Eastern Kentucky*, this court held, in American Society of Travel Agents v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978), that an association of travel agents lacked standing to challenge the failure of the Service to tax income the American Jewish Congress (AJC) derived from its travel programs. It was speculative, the court said, whether taxing the travel-related income of the AJC would yield increased patronage and profits to commercial travel agencies. The court also ruled in Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), that a small, domestic oil well operator lacked standing (under the "zone of interests" test) to seek a declaratory judgment that tax credits the Service granted to American oil producers for taxes paid to foreign nations were not authorized by the Internal Revenue Code.

Eastern Kentucky was featured in Judge Tamm's opinion in American Jewish Congress v. Vance, 575 F.2d 939 (D.C. Cir. 1978), in which this court divided three ways in approaching an effort by American Jews to stop United States cooperation in certain programs designed to foster Saudi Arabia's economic development. Plaintiffs there asserted economic injury but, as Judge Tamm pointed out, the relief requested, termination of the cooperative programs, "would eliminate the very economic advantages in which plaintiffs . . . alleged an interest." We find scant resemblance between that case, freighted with implications for United States relations with foreign nations that do not embrace our constitutional ideals, and the one before us, which involves the government's obligation to steer clear of aiding educational institutions that discriminate on an impermissible basis. *Id.* at 946. Thus, *Green*, *Norwood*, and *Gilmore* were not in point in *American Jewish Congress*. Plaintiffs did not press, and the court did not consider any contention that the government action in question contributed to perpetuation *within our borders* of a view of Jews as persons of lesser worth. Here, by contrast, the heart of plaintiffs' complaint is that government, by gracing racially discriminatory educational facilities with tax-exempt status, denigrates the standing and dignity of black Americans in their home communities.

Plaintiffs do not dispute that it is "speculative," within the *Eastern Kentucky* frame, whether any private school would welcome blacks in order to retain tax exemption[25] or would relinquish exemption to retain current practices.[26] They claim indifference as to the course private schools would take. Plaintiffs strenuously argue, however, that *Eastern Kentucky* is the wrong frame for their case. They assert, in essence, that there is at least one domain "outside the First Amendment area" where a person whose own tax liability is not affected has the requisite standing to challenge the administration of tax law, and that this lawsuit occupies that domain. We agree that *Eastern Kentucky* is not the line appropriately followed in the matter before us.

We turn next to the three adjudications that appear to us determinative of the standing issue in this case: the companion *Green* litigation; *Norwood v. Harrison;* and *Gilmore v. City of Montgomery.* All three involved, in common with the matter before us, charges of *government conduct* alleged to be inconsistent with an overriding, constitutionally rooted national policy against racial discrimination in United States educational facilities. Again in line with the instant case, none involved a claim for relief against private actors.

As we set out earlier, *see* pp. 3, 4, 9, 11-12 *supra*, the plaintiffs in *Green*, like those in *Wright*, are black parents and their minor schoolchildren attending public schools in desegregating areas; in both cases, the plain-

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[25] *But cf.* note 1 *supra* (significance of tax-exempt status to private schools).

[26] The court on remand in Norwood v. Harrison, 382 F. Supp. 921, 924 n.2 (N.D. Miss. 1974), noted that several schools whose practices the plaintiffs challenged elected to return books given them by the Mississippi State Textbook Commission rather than subject their policies to further scrutiny.

tiffs charged that the Internal Revenue Service has failed, through the inadequacy of its monitoring procedures, to confine tax-exempt status to private schools that do not practice racial discrimination. The remedy sought in the two cases, except for its geographical scope, is the same—the institution of procedures adequate to the task. That remedy, plaintiffs in both cases assert, matches precisely the injury they allege.

Norwood, like *Green* and *Wright*, was brought by parents of black schoolchildren against a government actor. Plaintiffs sought to enjoin in part the enforcement of Mississippi's long-established textbook lending program. The Mississippi Textbook Purchasing Board provided free textbooks to all schools in the state, including a number of "all-white, nonsectarian private schools which [had] been formed throughout the state since the inception of public school desegregation." *Norwood v. Harrison*, 340 F. Supp. 1003, 1011 (N.D. Miss. 1972), *vacated and remanded*, 413 U.S. 455 (1973). Despite the origin of the program in the days before school desegregation, and even if the textbook loans were "motivated by . . . a sincere interest in the educational welfare of all Mississippi children," 413 U.S. at 466, the Supreme Court held the scheme unconstitutional to the extent that it did not "steer clear . . . of giving significant aid to institutions that practice racial . . . discrimination." *Id.* at 467.

Of prime relevance to the case at hand, the Court in *Norwood* plainly stated that it was not critical to the plaintiffs' claim for relief whether "any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools." *Id.* at 465 (quoting from 340 F. Supp. at 1013). Chief Justice Burger, writing for the Court, explained:

> We do not agree with the District Court in its analysis of the legal consequences of [the] uncertainty [whether the relief requested would result in student transfers from private to public schools], for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.

Id. at 465-66.

Plaintiffs in *Norwood*, like the plaintiffs here, indicated no interest in attending the private schools that received textbooks at state expense, nor did they show that the textbook subsidy kept those schools afloat. The gravamen of plaintiffs' complaint was that the state had aided private racial discrimination when the Constitution commanded that government "steer clear" of such action. That complaint was enough, the Court's disposition clarifies, to entitle plaintiffs to relief. Without departing radically from *Norwood*, therefore, we cannot accept the district court's apparent view that plaintiffs here must either pursue relief they do not want—admission of their children to private schools—or allege and prove that withdrawal of tax-exempt status would cause those schools to suffer enrollment declines and, correspondingly, quicken the pace of public school desegregation.

Finally, in *Gilmore v. City of Montgomery*, black citizens who had brought a successful action in 1958 to desegregate public parks in Montgomery, Alabama, reopened the litigation in 1970 and sought supplemental relief in 1971. They complained that the city was allowing "racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities." 417 U.S. at 562. The Court sustained a lower court injunction to the extent that it barred ex-

clusive temporary use of public recreation facilities by segregated private schools. Citing *Norwood*, the Court repeated in *Gilmore* that

> any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has "a significant tendency to facilitate, reinforce, and support private discrimination."

417 U.S. at 568-69 (quoting from 413 U.S. at 466). While *Gilmore* suggested that the plaintiffs might not have standing "to claim relief against certain nonexclusive uses by private school groups," *id.* at 570 n.10, the Court had little difficulty concluding that plaintiffs were entitled to challenge special reservation of playing fields for such groups.

Like the tax-exempt status at issue here, the exclusive temporary use of park facilities in *Gilmore* was a government benefit not available to the public generally. Government must "steer clear" of providing such benefits to racially discriminatory local groups. *Norwood*, 413 U.S. at 467. The *Gilmore* plaintiffs, black citizens of the community, were considered appropriate enforcers of that obligation although they made no showing that the segregated schools would change their policies or close up shop were they denied specially reserved access to park football fields and baseball diamonds. All that could be said with security was that the special arrangements made life easier for such schools.

Green, *Norwood*, and *Gilmore* presented plaintiffs whose standing seems to us indistinguishable on any principled ground fron the standing of the plaintiffs in this action. If the plaintiffs before us are not entitled to question the IRS practices at issue here, it is difficult to comprehend why the *Green*, *Norwood*, and *Gilmore*

plaintiffs were entitled to challenge the tax exemptions, textbook loans, and specially reserved park facilities at issue in those cases.[27] We therefore inquire next whether those precedents remain vital, or whether they have been overruled, *sub silentio*, by *Eastern Kentucky*.

The Supreme Court's decisions in *Green*, *Norwood*, and *Gilmore* did not focus on standing as *Eastern Kentucky* did. But as *Eastern Kentucky* emphasized, "[t]he necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies." 426 U.S. at 39. Absent explicit Supreme Court direction to do so, we resist impugning High

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[27] At oral argument, the Service stressed that *Green* (when the action commenced in 1969), *Norwood*, and *Gilmore*, were egregious cases. In those cases, the private schools aided by government action openly avowed discriminatory policies while in this case, plaintiffs do not allege that any particular school turns away students on the basis of race. Instead, plaintiffs complain more generally that some schools "are slipping through the Commissioner's net of enforcement." But the standing analysis should remain unaffected so long as plaintiffs have a right to demand that their government "steer clear" of aiding discrimination in local educational facilities, and contend, as plaintiffs do here, that current government (IRS) practice does not meet the "steer clear" standard. *Cf.* note 43 and accompanying text, *infra* (Commissioner's acknowledgment that, under current guidelines, schools adjudged racially discriminatory nonetheless retained tax-exempt status).

We do not include Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), in the same category as *Green*, *Norwood*, and *Gilmore*, although plaintiffs cite *Griffin* with the others. That most egregious case involved more than state aid to a private actor. In addition to government assistance for private school education in the form of tuition grants and tax credits, the county's public schools had been closed down.

Court precedent by indulging the assumption that the Court reached the merits in *Green*, *Norwood*, and *Gilmore* in disregard of the standing requirement. *Accord*, *Moton v. Lambert*, 508 F. Supp. 367, 369-70 (N.D. Miss. 1981). Such an assumption appears all the more unwarranted in view of the indications in all three cases that the Court's attention was drawn to the issue.

In *Green*, standing was addressed summarily in the lower court. 309 F. Supp. at 1132.[28] More significantly, the Jurisdictional Statement in *Green* spotlighted the question. Filed by intervenor Coit, as representative of a class of parents and children who supported or attended all-white private schools, the Jurisdictional Statement listed plaintiffs' standing first among "Questions Presented by the Appeal." Jurisdictional Statement at 11, *Coit v. Green*, 404 U.S. 997 (1971) (No. 71-425). As Coit framed the issue: "Was the lower court in error in holding that plaintiffs had constitutional standing to restrain federal recognition of educational exemptions for private segregated schools?" *Id.* While we do not ascribe to the Supreme Court's summary affirmance in *Green* wholesale endorsement of the district court's views,[29] the High Court's disposition is binding upon us

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[28] The relevant passage is set out at p. 5 *supra*.

[29] Because the IRS changed its course before the issuance of the permanent injunction in *Green*, the Supreme Court later noted that the summary affirmance in Coit v. Green "lacks the precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974). The admonition was stated more vigorously in Prince Edward School Foundation v. United States, 101 S. Ct. 1408, 1408 n.1 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("th[e] affirmance lacks precedential weight because no adversarial contest remained in *Green* by the time the case reached this court"). It should be noted, however, that the plaintiffs sought and obtained relief in *Green* beyond the measures the Service agreed to

until such time as the Court informs us otherwise. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). As already observed, we do not believe a lower court should cast aside the Supreme Court's judgment in *Green* by ascribing to that tribunal a rush to decision, heedless of core justiciability requirements.

In *Norwood*, as in *Green*, plaintiffs' standing was challenged in the lower court. 340 F. Supp. at 1007. However, the issue was not pursued on appeal. But, of course, the question could have been raised by the Supreme Court *sua sponte* if it entertained doubt as to plaintiffs' satisfaction of a core Article III requirement. Finally, in *Gilmore*, the Court adverted specifically to the requirement that plaintiffs have standing to pursue the relief requested. 417 U.S. at 570 n.10.

In *Eastern Kentucky*, the Supreme Court viewed plaintiffs' sole injury as inflicted by the hospitals that declined to serve indigents, and not by the Internal Revenue Service. 426 U.S. at 40-41. In contrast, the Court did not approach *Green*, *Norwood*, and *Gilmore* as assaults mounted against government action in an indirect effort to gain access to a nongovernmental facility. Rather, the Court recognized the right of black citizens to insist

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take. *See* 330 F. Supp. at 1170, 1174-77. More significantly, the intervenors who appealed to the Supreme Court in *Green* remained uncompromisingly adverse to the plaintiffs.

We note finally that, although *Green* was not such a case, there are extraordinary situations in which the Supreme Court may proceed to judgment despite the absence of a genuine adversary contest in the lower courts. *See* Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955) ("In view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel 'to appear and present oral argument, as *amicus curiae*, in support of the judgment below.' ") (quoting from Granville-Smith v. Granville-Smith, 348 U.S. 885, 885-86 (1954)).

that their government "steer clear" of aiding schools in their communities that practice race discrimination. In view of the centrality of that right in our contemporary (post-Civil War) constitutional order, we are unable to conclude that *Eastern Kentucky* speaks to the issue before us. We therefore follow *Green*, *Norwood*, and *Gilmore*, unless and until the Supreme Co[illegible] instructs us otherwise, and accordingly find no standing impediment to plaintiffs' claim.

III. Appropriations Riders Staying IRS Initiatives Do Not Preclude the District Court From Fashioning a Remedy

In amendments to the Treasury Appropriations Act for fiscal year 1980,[30] Congress twice prohibited the Internal Revenue Service from using appropriated funds to formulate or carry out new guidelines which would cause any private school to lose tax-exempt status.[31] These riders, known as the Dornan and Ashbrook amendments, were intended both to preserve guidelines the IRS had adopted prior to August 1978 to identify racially discriminatory private schools,[32] and to prevent the Service from displacing or augmenting existing guidelines with more aggressive procedures.[33] In this case, the district court read into the congressional action more than a restraint on the IRS. It found that the action inhibited courts as well. Court-ordered rules of the kind plaintiffs seek, the district judge said, "would be completely contrary to Congressional intent and policy." 480

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[30] Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979).

[31] *See* notes 17-19 and accompanying text *supra*.

[32] *See* notes 4 & 7 and accompanying text *supra*

[33] *See* notes 11-15 and accompanying text *supra*.

F. Supp. at 799. That consideration alone, he concluded, warranted threshold dismissal of the action.[34]

Intervenor Allen argues with force in support of the position adopted in this case by the district judge. The appropriations riders reflect a congressional determination that existing IRS procedures are adequate to identify racially discriminatory schools, intervenor Allen maintains,[35] therefore a court determination to the contrary would defy the will of Congress. Plaintiffs, on the other hand, maintain that the restraints imposed by the appropriations act riders, by their terms, apply only to IRS-initiated action and do not purport to control court adjudication. Read to extend to a federal court's remedial authority, plaintiffs assert, the riders could not withstand constitutional review.[36] The plaintiffs invoke

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[34] The district judge recognized, however, that Congress had not dictated his course. He agreed with plaintiffs that "the legislative history of the [appropriations riders] apparently *allows* a federal court to fashion a remedy in this area." 480 F. Supp. at 799 (emphasis in original). *Accord*, 126 Cong. Rec. H7212-13 (daily ed. Aug. 19, 1980) (remarks of Rep. Gradison).

[35] Typical of the view expressed by proponents of the riders is the statement of Senator Helms, quoted by intervenor:

> The existing law provides substantial procedures for the IRS to deny the tax exempt status of schools which discriminate.
>
> . . . [The appropriations bill amendment] does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis.

125 Cong. Rec. S11979-80 (daily ed. Sept. 6, 1979).

[36] Plaintiffs further urge that, even as restraints directed solely to the IRS, the appropriations act riders are unconstitutional. *Cf.* Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 Yale L.J. 1360, 1368-86 (1980) (suggesting that the riders may violate establish-

both separation of powers doctrine [37] and the proscription of government support for race discrimination.[38]

Our starting point is a proposition not disputed in this litigation or in conflict with the appropriations riders: racially discriminatory institutions are ineligible for tax-exempt status under section 501(c)(3) of the Internal Revenue Code. As the court held in *Green v. Connally*,[39] schools that do not adopt and administer nondiscriminatory admissions practices do not qualify for tax benefits otherwise available to nonprofit educational organizations. Although the *Green* decision rests on statutory interpretation,[40] the court indicated that its ruling was

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ment ban or equal protection guarantee but not separation of powers doctrine). The question before us concerns only the propriety of court adjudication. We do not reach the further issue plaintiffs tender regarding the legitimacy of appropriations riders to stop IRS action.

[37] *Cf.* Nixon v. Administrator of General Services, 433 U.S. 425, 441-43 (1977). *See also Hearings*, *supra* note 1, at 366 (statement of Professor Laurence Tribe).

[38] *See* Brown v. Califano, 627 F.2d 1221, 1235-37 (D.C. Cir. 1980). *See generally* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 Harv. L. Rev. 378 (1979).

[39] *See* notes 4-6 and accompanying text *supra*.

[40] The three-judge court looked to the common-law definition of "charitable" but ultimately rested on the overriding federal policy against racial discrimination, a policy directed most pointedly against government support for racially segregated education. 330 F. Supp. at 1163-64.

Congress appears to agree with the *Green* court that section 501(c)(3) does not accommodate tax-exempt status for racially discriminatory private schools. No effort has been made to require the IRS to withdraw guidelines adopted before August 1978. Moreover, Congress overturned a court holding, McGlotten v. Connally, 338 F. Supp. 448, 457-59 (D.D.C. 1972) (three-judge court), that nonprofit social clubs, although racially discriminatory, were eligible for tax-

impelled by constitutional considerations: "[A] contrary interpretation of the tax laws would raise serious constitutional questions"; "it would be difficult indeed to establish" that schools practicing racial discrimination could be ranked as tax-exempt organizations by a federal authority "consistently with the Constitution." 330 F. Supp. at 1164-65.[41]

Next, as we set out earlier,[42] in 1976 this action was commenced, and the *Green* case was reopened, based on the charge that the IRS had failed to enforce effectively the mandate that racially discriminatory schools be denied tax exemptions. In response, the IRS, in August 1978, released proposed new guidelines and, in February

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exempt status under section 501(c)(7). Congress added section 501(i), which explicitly denies exempt status to social clubs that discriminate "against any person on the basis of race, color, or religion." Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697 (erroneously enacted as subsection (g); corrected 1978). The Senate Report on the private club provision cites *Green* as the leading case on tax-exempt status under section 501(c)(3) for educational institutions, and reflects an understanding that race discrimination disqualifies private schools from obtaining or retaining tax exemption. S. Rep. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976). *But cf.* Prince Edward School Foundation v. United States, 101 S. Ct. 1408, 1410 (1981) (Rehnquist, J., dissenting from denial of certiorari) (suggesting that the language of section 501(c)(3), interpreted in its "ordinary, everyday sense," does not support the *Green* court's construction of the statute).

[41] *Cf.* Bittker & Kaufman, *supra* note 5, 82 Yale L.J. at 78 (distinguishing between the case of private schools addressed in *Green*, where "the tax allowances under attack would inure to the benefit of a racially restricted group," and cases in which a racially restricted group sponsors and administers charitable activities, but the activities themselves are open equally to all persons regardless of race).

[42] *See* pp. 8-11 *supra*.

1979, published a revised version that included adjustments to meet some, but by no means all, of the critical commentary. Explaining to Congress why the Service sought to strengthen its procedures, the Commissioner of Internal Revenue reported that, under the existing rules, a number of schools retained tax-exempt status although they had been adjudged racially discriminatory by federal courts in nontax cases.[43] In reaction to the proposed new IRS guidelines, Congress passed the appropriations limitations.[44] Thus the IRS proposals, framed under the impetus of pending litigation, were shelved by a "stopgap" legislative technique [45] that leaves the Service in an ambiguous position.[46]

Turbulent issues under our fundamental instrument of government would confront us were we to read the

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[43] *Hearings, supra* note 1, at 5 (statement of Jerome Kurtz).

[44] Congressional subcommittees had been reviewing the proposed guidelines at the time the issue was brought directly to the House floor through the appropriations act amendment device. *See Hearings, supra* note 1; *Tax-Exempt Status of Private Schools: Hearings on S.103, S.449, S.990, S.995 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979). *See also* Note, *supra* note 38, 93 Harv. L. Rev. at 383-84, 392. Since the 1979 congressional action by appropriations act riders, the regular tax-writing committees of the House and Senate have not further reviewed the Commissioner's action or proposed action in this area, nor have they ventured to formulate other standards for the administration of sections 501(c)(3) and 170(c). Brief for the Federal Appellees at 32. *See also* note 61 *infra*.

[45] *See* 125 Cong. Rec. H5882 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook).

[46] For criticism of this mode of legislating, raising constitutional, policy, and practical problems the technique entails, *see Parnell, supra* note 36; Note, *supra* note 38, 93 Harv. L. Rev. at 390-92.

appropriations riders as more than a temporary stop order on IRS initiatives.[47] We see no reason to grapple with those issues in view of the representations made in Congress concerning the effect of the riders:

> We are just saying do not go forward with these broad [IRS] regulations or procedures, whatever you want to call them, until the Congress *or a court* affirmatively acts on that subject. That is all we are trying to do.

125 Cong. Rec. H5882 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook) (emphasis supplied).[48] As thus described, the riders are holding orders and they hold only the IRS, they do not purport to control judicial dispositions.

The district judge who, in this action, ruled out a judicial decree going beyond existing IRS guidelines, nevertheless granted such relief in the reopened *Green*

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[47] *See* notes 36-38 *supra* and authorities cited therein.

[48] On a later day, at a time when the House was not debating any rider, Representative Ashbrook delivered an address in which he maintained that he did indeed intend his appropriations rider to halt court as well as IRS action. *See* 126 Cong. Rec. H5197, H5198 (daily ed. June 18, 1980). However, he thereafter acknowledged that his earlier statement accurately reflected the effect of the rider. He disavowed any purpose to challenge a court order and said, particularly: "There is an orderly process which was followed in Mississippi [in the *Green* case] where the courts or IRS can become involved. I did not change that in any way." *Id.* at H7291 (daily ed. Aug. 20, 1980). *See also* the ruling of the Chairman, declaring in order House consideration of the Dornan amendment in connection with fiscal year 1981 appropriations: "With reference to the court order issue, the language of the amendment does not in any way speak to the question of court orders or address the viability of court orders with regard to the agency's actions." *Id.* at H7212 (daily ed. Aug. 19, 1980). *Accord, id.* at H7293 (daily ed. Aug. 20, 1980) (remarks of Rep. Panetta).

case.[49] His rulings in the two proceedings have been perceived as "contradictory" and "inconsistent."[50] His sole explanation for the divergent dispositions appears in a footnote in this case supplying two reasons: (1) the "jurisdictional" arguments he found decisive in *Wright* had been rejected by another judge in *Green* before the two cases were consolidated; (2) the three-judge court had "affirmed" the standing of the *Green* plaintiffs prior to granting injunctive relief and the only issue open in that case was "whether or not defendants have complied with the injunction issued in 1971." 480 F. Supp. at 793 n.1.

The district judge did not explain why he regarded *Green* as uninstructive—without precedential value—on the "jurisdictional" arguments in *Wright*, nor did he clarify why he considered congressional action significant in *Wright* but not in *Green*. It is true that the *Green* litigation has a long history and involves Mississippi private schools only, while the instant case was initiated some seven years after *Green* commenced and encompasses private schools in all states. But the appropriations riders do not distinguish Mississippi from the rest of the nation. Nor did the original *Green* court interpret section 501(c)(3) for Mississippi only. Rather, that court declared the principle underlying its decision "applicable to schools outside Mississippi with the same or similar badge of doubt." 330 F. Supp. at 1174.[51] We

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[49] *Green v. Miller*, No. 1355-69 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980).

[50] *See* 126 Cong. Rec. H5193, H5195 (daily ed. June 18, 1980) (remarks of Rep. Ashbrook); *id.* at H7214 (daily ed. Aug. 19, 1980).

[51] *Cf.* 126 Cong. Rec. H5195 (daily ed. June 18, 1980) (remarks of Rep. Stokes) (noting the irrationality of maintaining one regime for Mississippi private schools, another for private schools elsewhere in the country).

believe the district judge correctly determined that no congressional action deterred him from moving beyond existing IRS guidelines in *Green*, and that he erred in rejecting at the outset any prospect for similar movement in this case.

IV. No Nonreviewability Doctrine Impedes Adjudication on the Merits

Referring to "the doctrine of nonreviewability," the district judge deemed it inappropriate to adjudicate this action even if no standing problem barred the way and no congressional suggestion held him in check. 480 F. Supp. at 797-98. He relied on no statutory source for the doctrine invoked.[52] Citing two cases, however,[53] he reasoned that courts are not equipped to supply technical detail and monitoring services for an agency's admin-

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[52] Defendants and intervenor do not suggest, nor did the district court, that the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), which excludes suits "with respect to Federal taxes," or the Tax Injunction Act, 26 U.S.C. § 7421(a) (1976), which bars suits to enjoin the assessment or collection of taxes, precludes this litigation. Dismissal on the basis of these statutes, and a sovereign immunity bar, were urged, unsuccessfully, in Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded on other grounds*, 426 U.S. 26 (1976), and McGlotten v. Connally, 338 F. Supp. 448, 452-54 (D.D.C. 1972) (three-judge court). A suit to restrain the allowance of tax benefits falls outside the literal reach of § 7421(a). Moreover, cases of this nature, ultimately raising nonfrivolous constitutional objections to IRS action, are "few and far between"; they do not threaten large interference by "public interest" litigants with the administrative process of collecting taxes. *See* Bittker & Kaufman, *supra* note 5, 82 Yale L.J. at 55.

[53] Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958) (decision to initiate proceedings to fix new tolls pursuant to statutory formula is left to agency expertise); Amer-

istration of a complex statutory scheme. He concluded the discussion under this heading by observing that judicial review *vel non* was not the issue. Rather, the core question was the type of relief appropriate and feasible. In his judgment, appropriate relief could be gained through litigating case by case whether a particular school excludes or otherwise discriminates on the basis of race. We find no solid ground for dismissal of this action on the asserted "nonreviewability" premise.

First, as we pointed out in preceding portions of this opinion, in suggesting that appellants' remedy lies in case-by-case litigation against each allegedly offending school, the district court focused on an injury other than the one the complaint describes. To recapitulate, appellants disclaim any interest in gaining admission to the schools in question. Rather, they complain of conduct by their government. They assert that current IRS practice permits schools that in fact discriminate on the basis of race to acquire and retain section 501(c)(3) status and, thereby, to attract tax-deductible contributions for their maintenance. Part of each such contribu-

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ican Society of Travel Agencies, Inc. v. Simon, 75-1 U.S.T.C. ¶ 9484 (D.D.C. 1975), *aff'd*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (declining competitors' request for court review of IRS treatment of income American Jewish Congress derived from travel programs). Neither case involved challenges to agency action alleged to derive ultimately from constitutional concerns that courts, as opposed to administrators, are better equipped to address. *Cf.* Prince Edward School Foundation v. United States, 101 S. Ct. 1408, 1410 (1981) (Rehnquist, J., dissenting from denial of certiorari). On pragmatic grounds, both decisions concluded that disposition appropriately resided in expert administrative officials without court oversight. The authority most directly in point, Green v. Connally, is not mentioned in the portion of the district court's decision holding this case unsuitable for judicial review.

tion, appellants aver, constitutes prohibited government support for race discrimination in educational facilities.[54] Such government support, appellants contend, stigmatizes black schoolchildren and their parents by signaling official approbation of educational institutions that perpetuate in local communities notions, once prevalent in our nation, of the inferior quality of the black race. Thus their challenge, their alleged injury, and the relief they seek are directed to what a government agency, the IRS, is doing. They do not challenge private action, and it is not the prerogative of a district judge to turn away the lawsuit they have in fact instituted solely because they might have instituted a claim of a different character, one challenging private rather than government action.

Second, we turn to the case as appellants have drawn it, a case against a government agency alleged to furnish economic benefits to racially discriminatory local educational institutions. We believe that, should appellants

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[54] Green v. Connally accepts this thesis. For discussion in commentary, *compare* Note, *supra* note 38, *and* Comment, *Tax Incentives as State Action*, 122 U. Pa. L. Rev. 414 (1973), *with* Bittker & Kaufman, *supra* note 5, 82 Yale L.J. at 75-79 (distinguishing *Green*, based on the strength and clarity of the policy against racially restricted education and the benefit tax allowances confer on the school, from McGlotten v. Connally, involving fraternal orders, where freedom of association concerns loomed larger and no showing was made that the fruits of the philanthropy in question were distributed on a racially restrictive basis).

The Service observes, citing Walz v. Tax Commission, 397 U.S. 664 (1970), that "the Court held that a grant of tax exemption to churches did not amount to an establishment of religion." Brief for the Federal Appellees at 19. As *Norwood* succintly explains, "[t]he leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools." 413 U.S. at 464 n.10. *See id.* at 470.

succeed on the merits,[55] the remedial problem can be handled without large scale judicial intervention in the administrative process. This case does not involve any arcane question of tax law; its sensible adjudication requires no entanglement with complex, technical, interrelated aspects of the Internal Revenue Code and its administration.[56] The district court should not and need not become a "shadow [C]ommissioner of Internal Revenue" or "the administrator of a nationwide tax enforcement program." 480 F. Supp. at 797. Guided by its own experience[57] and that of other courts,[58] the district court is equipped to accord relief that does not "impose grave burdens" or involve "unfathomable effort." *Id.* The court may call for the parties' participation in framing a manageable decree and may reject proposals that, in their scope or particularity, reach for more than is necessary to provide effective relief.

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[55] The precise statutory and constitutional questions plaintiffs raise have not yet been addressed by the Supreme Court. *See* Prince Edward School Foundation v. United States, 101 S. Ct. 1408 (1981) (Rehnquist, J., dissenting from denial of certiorari).

[56] As intervenor candidly notes, the current IRS guidelines, embodied in Rev. Proc. 75-50, 1975-2 C.B. 587, were adopted from the court's 1971 injunctive order in *Green*. Brief for Intervenor-Appellee at 26 n.7.

[57] *See* Green v. Miller, No. 69-1355 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980).

[58] Confronted with genuine cases and controversies, federal judges have been required to deal with situations presenting remedial problems far more complex and difficult than the one this case presents. *See generally* Johnson, *In Defense of Judicial Activism*, 28 Emory L.J. 901 (1979); Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977).

In sum, neither deference to administrative expertise, nor potential action by the legislature supplies an acceptable basis for avoiding decision on the merits in this case. The area is not one in which tax experts have special competence,[59] nor is the Service in a comfortable position to reevaluate the adequacy of current procedures with a view to alteration.[60] Congress is not inhibited by the pendency of this case or *Green* from addressing the issue by revising section 501(c)(3) so that the provision speaks more precisely,[61] so long as such revision comports with constitutional limitations.

Conclusion

We have held that the plaintiffs here have standing to pursue this action, that the district court retains independence to fashion a remedy should plaintiffs succeed on the merits, and that no nonreviewability doctrine impedes adjudication on the merits. Our rulings do not reach the substance of plaintiffs' claims. After affording all parties a full and fair opportunity to present their positions, the district court will be equipped to decide

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[59] Intervenor so remarked at congressional hearings. *See Hearings, supra* note 1, at 388-89 (remarks of W. Wayne Allen).

[60] As discussed in the preceding section, Congress acted to stay further IRS initiatives.

[61] The House Committee on Appropriations recommended holding the Service proposals in abeyance "until the appropriate legislative committees have had a chance to evaluate them." H.R. Rep. No. 248, 96th Cong., 1st Sess. 15 (1979). The federal appellees inform us that those committees have "shown no inclination" to proceed with the evaluation. Brief for the Federal Appellees at 32. *Cf.* 126 Cong. Rec. H7212, H7213 (daily ed. Aug. 19, 1980); *id.* at H7293 (daily ed. Aug. 20, 1980) (remarks of Reps. Gradison and Panetta, criticizing Congress for failure to address the issue through the regular lawmaking process).

whether plaintiffs have established a claim for relief regarding the administration of section 501(c)(3).[42]

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[42] The order and permanent injunction in Green v. Miller has no preclusive effect in this action. The district court retains jurisdiction in that action; intervenor here did not participate in *Green;* no fact findings or legal conclusions accompany the May 1980 order and permanent injunction in *Green.* Moreover, a decision on the merits for plaintiffs in this lawsuit, and the decisions and orders in *Green,* while they would count as relevant precedent, would not preclude challenges to IRS action by schools not party to the litigation. *See* 26 U.S.C. § 7428 (declaratory judgment relating to tax-exempt status); Restatement (Second) of Judgments §§ 41 (Tent. Draft No. 1, 1973), 78(3) (Tent. Draft. No. 2, 1975), 68, 68.1 (Tent. Draft No. 4, 1977), 88 (Tent. Draft No. 3, 1976).

TAMM, *Circuit Judge, dissenting:* Under cover of selecting between conflicting lines of Supreme Court precedent, the court today boldly creates new law on the jurisdiction of federal courts. Under cover of selecting the most comfortable precedent, the court in fact oversteps well-established limits upon the power of the judiciary. We are not required, as the majority suggests, to choose among Supreme Court precedent as we would footwear—selecting that which "best fits the case before us." Instead, we need only examine carefully the law of standing as it presently exists and properly apply that law to the case before us.

The majority's cleverly constructed and ostensibly reasonable opinion hinges initially upon the setting up of conflicting lines of Supreme Court precedent. In one, characterized by the majority as the "*Eastern Kentucky*" line, the Court addressed at some length the question of standing to sue in federal courts. In the other, characterized as the "*Green*, *Norwood*, and *Gilmore*" line, the Court addressed the constitutionality of governmental involvement in racial discrimination. Although a reading of the majority's analysis of this latter line of cases may lead one to think otherwise, the Supreme Court made no statement in these cases that can be construed as justifying the result reached by the court today. In fact, the *only* remarks by the Court upon the question of standing make clear that the traditional requirements of standing must be satisfied in this case as in any other. *Gilmore v. City of Montgomery*, 417 U.S. 556, 571 n.10 (1974).

Despite this explicit reminder, the majority interprets this line of precedent as requiring it to abandon long-established standing principles, principles limiting the exercise of judicial power to the redress of *actual injury*. To assess the necessity of such an interpretation, we must first turn to those cases by which the majority claims to be bound. In *Coit v. Green*, 404 U.S. 997 (1971), the Supreme Court affirmed *without opinion* a

decision that the Internal Revenue Code required the denial of tax exemptions for racially discriminatory private schools and of tax deductions for contributions to such schools. The Court also affirmed the awarding of injunctive relief barring the IRS from granting tax-exempt status to any private school in Mississippi which did not adopt a racially nondiscriminatory admissions policy and communicate that policy to the community. The Service adopted national guidelines in accord with this decision.

Plaintiffs' standing was not addressed in the district court decision affirmed by the Supreme Court. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). Only in its ruling on the preliminary injunction did the district court deal with the issue at all, and even then its views were expressed in only one sentence. *Green v. Kennedy*, 309 F. Supp. 1127, 1132 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970). Further elaboration of this issue was not undertaken at the Supreme Court: the standing of the plaintiffs was challenged only by the intervenor Coit, and *only* in the form of an initial question in the Jurisdictional Statement *without any further development.*

The majority opinion mischaracterizes the status of *Green* at this point as a "sharp adversary contest . . . ." Majority opinion (Maj. op.) at 5. In fact, the Supreme Court has explicitly stated that, because the IRS had reversed its position prior to appeal, this case did *not* involve "a truly adversary controversy." *Bob Jones University v. Simon*, 416 U.S. 725, 740 n.11 (1974). For that reason, moreover, the Court declared that this case lacked "precedential weight . . . ." *Id. See also Prince Edward School Foundation v. United States*, 101 S. Ct. 1408, 1408 n.1 (1981) (Rehnquist, J., joined by Stewart and Powell, JJ., dissenting from denial of certiorari). The majority opinion today thus declares itself *bound* on the issue of standing by a Supreme Court affirmance

without opinion, in which the issue of standing was raised only in an intervenor's list of questions presented, and where the Court itself has explicitly undermined the precedential status of that affirmance. I find such a view of precedent disturbing [1] and believe that this court has never before advanced such a position.[2]

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[1] The majority opinion expresses the view that lower courts are bound by Supreme Court summary affirmance of a decision even as to issues that were not addressed in that decision, as long as a contrary decision on that issue would preclude affirmance. Such a view is directly contrary to the Court's statements concerning the precedential value of its summary affirmances. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-83 (1979); Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam); Fusari v. Steinberg, 419 U.S. 379, 388-89 n.15 (1975). Chief Justice Burger has taken special care to point out that such a disposition "is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Id.* at 390, 392 (Burger, C.J., concurring). The court today acts contrary to this admonition in employing the summary affirmance of *Green* as support for its view of the law of standing.

The majority's innovative view of precedent, especially questionable in light of the Service's reversal of position prior to the affirmance in *Green*, is to be deplored as a statement of jurisprudential principle. *See* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B. U. L. REV. 373, 410 (1972). Such a statement is also regrettable when it substitutes for analysis of the issue before us. The court may well, however, simply discard such a view in the future when it finds it politic to do so. *Cf.* Note, *supra*, at 386.

Ultimately, this declaration of *Green* as binding precedent on the issue of standing is of no relevance to the case at hand. The allegations of injury made in this case, and the claim for relief pressed by plaintiffs here, differ substantially from those made in *Green*. Thus, even if it were binding, it would still not be precedent. *See* note 5 and text following *infra*.

[2] I emphasize that this case involves neither a situation in which reconsideration of an older Supreme Court precedent

The majority opinion attempts to support the result it reaches by contrasting the action of the district court upon the reopening of *Green* with its action in the present context. Accordingly, the majority emphasizes at several places the similarity of these two cases, while pointing out their dissimilar dispositions. Maj. op. at 11-12, 15, 30-31. Observing that the *same* district court judge ruled in both cases, the majority opinion suggests that such an "anomalous result" is irreconcilable and even arbitrary. A review of the procedural histories of these cases, however, reveals the fallacy of this suggestion. For this reason it is appropriate to set forth these histories before proceeding further.

Mississippi plaintiffs instituted *Green* in 1969. In 1970 a three-judge court issued a preliminary injunction against the IRS and noted, albeit summarily, that plaintiffs possessed standing. *Green v. Kennedy*, 309 F. Supp. 1127, 1132 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970). The court did not address the question of standing upon issuance of the permanent injunction. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

The *Green* plaintiffs reopened this case in 1976, one week prior to the filing of the action here on appeal. *Wright* and *Green* were then consolidated and, on May 17, 1977, the late Judge Waddy heard motions to dismiss that raised the precise jurisdictional issues before us today. During this hearing Judge Waddy emphasized

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is requested of this court, Breakefield v. District of Columbia, 442 F.2d 1227 (D.C. Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 909 (1971), nor, as the majority apparently believes, a situation concerning the binding precedential effect of Supreme Court summary dispositions of cases within its appellate jurisdiction. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). *See generally* Russell v. Hathaway, 423 F. Supp. 833, 836 (N.D. Tex. 1976) (three-judge court).

at several points his belief that "separate considerations" governed the two cases. *See, e.g.*, Hearing Transcript of May 17, 1977, at 18. At one such point, he aptly characterized the standing argument pressed by the *Wright* plaintiffs' counsel as being that "you're Black and a citizen, and live in South Carolina," and thereby possess standing. *Id.* at 91. At the conclusion of the hearing, Judge Waddy denied the Government's motion to dismiss in *Green* but took the motion in *Wright* under advisement. The court found that the *Green* plaintiffs "have a right to proceed to determine whether or not that there has been good-faith compliance with the Order of this Court and if not, then the Court has the duty and responsibility to amend or supplement its prior Decree in such manner as to affect (sic) the purposes of the original Decree." *Id.* at 106-07.

Thus, before *Green* had reached the chambers of the present district court judge, not only had two other district courts sustained plaintiffs' standing, but the Supreme Court had affirmed, however summarily, the granting of the permanent injunction. In these circumstances, therefore, it would appear reasonable for the district court to accept the prior rulings on standing as the law of the case. *See United States ex rel. Epton v. Nenna*, 446 F.2d 363, 365-66 (2d Cir.), *cert. denied*, 404 U.S. 948 (1971). Although "law of the case" principles do not apply as stringently to jurisdictional questions such as standing,[3] it is not necessary for us to decide whether

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[3] In the ordinary case, such prior rulings are not binding.

> Where a jurisdictional challenge is repeated, however, as is the case where standing is in issue, the "law of the case" requirement is less rigid. Earlier jurisdictional rulings are entitled to important, but not dispositive weight . . . If it can be shown that controlling authority has subsequently taken a clearly contrary view of the issue, then the renewed motion to dismiss for lack of jurisdiction may be appropriately filed and may prevail.

Common Cause v. Bolger, No. 1887-73, slip op. at 2 (D.D.C.,

this failure to reconsider standing was erroneous. At the least, these disparate histories provide a logical explanation for the district court's seemingly disparate treatment of these related matters. The majority opinion chastizes the district court for failing to "explain why [it] regarded *Green* as uninstructive—without precedential value—on the 'jurisdictional' arguments in *Wright* . . . ." Maj. op. at 31. I, on the other hand, commend the district court both for its refusal to adopt the view of precedent espoused today by the majority and for its attempt to apply the *current law of standing* to what is, after all, a question of standing.

Unlike *Green*, the two other cases "binding" the majority are dispositions by opinion. *Norwood v. Harrison*, 413 U.S. 455 (1973); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). In *Norwood*, however, as in *Green*, the Court made no mention of the plaintiffs' standing. The district court, ruling the textbook program constitutional, had sustained plaintiffs' standing in one sentence, 340 F. Supp. at 1007,[4] and, as the majority opinion points out, this "issue was not pursued on appeal." Maj. op. at 24. In *Gilmore*, on the other hand, reference was made to the question of standing. 417 U.S. at 570-71 n.10. Moreover, this reference deserves more attention than that received from the majority's passing allusion—for this reference demonstrates the fallacy of the majority's reliance upon either *Gilmore* or *Norwood*

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filed Dec. 11, 1980) (three-judge court). *See also* Bowman v. Udall, 243 F. Supp. 672, 677 (D.D.C. 1965), *aff'd sub nom.* Hinton v. Udall, 364 F.2d 676 (D.C. Cir.), *cert. denied*, 385 U.S. 878 (1966).

[4] One commentator pointed to this opinion as an example of the way in which "[c]ourts typically fail explicitly to identify the relevant standing criteria." Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 386 n.44 (1979).

to sustain the standing of the plaintiffs presently before the court.

As the majority opinion notes, maj. op. at 20, black citizens who had won the desegregation of public parks in Montgomery, Alabama in 1958 reopened that litigation in 1970. 417 U.S. at 560. Filing a motion for supplemental relief in 1971, they alleged that the city was permitting racially segregated schools, groups, and clubs to use public recreational facilities. The district court enjoined the city from permitting use of its recreational facilities by any private school that was racially segregated or that had a racially discriminatory admissions policy. The court of appeals sustained that part of the injunction which restrained the use of facilities when that use was "exclusive" and not in common with other citizens, but reversed that part of the district court order enjoining nonexclusive enjoyment of those facilities by private school children.

Defining "exclusive use" as the possession and control of an entire facility by a private group, the Supreme Court sustained the injunction to the extent of prohibiting such use by racially segregated private schools. The Court found that "the city's policy of allocating facilities to segregated private schools, in the context of the 1959 parks desegregation order and subsequent history, created, in effect, 'enclaves of segregation' and deprived petitioners of equal access to parks and recreational facilities." *Id.* at 566. As to the modification made by the court of appeals, however, permitting *nonexclusive* access to public recreational facilities even by private organizations having racially discriminatory admissions policies, the Court reversed, stating:

> Upon this record, we are unable to draw a conclusion as to whether the use of zoos, museums, parks, and other recreational facilities by private school groups in common with others, and by private

> nonschool organizations, involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds. . . . The questions to be resolved and the decisions to be made rest upon careful identification of the different types of city facilities that are available and the various uses to which they might be put by private groups.

Id. at 570. It thus remanded the case to the district court.

At this time the Court also remarked upon the standing of plaintiffs on remand.

> [W]e are not prepared, at this juncture and on this record, to assume the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups. The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered. Here, the plaintiffs were parties to an action desegregating the city parks and recreational facilities. Without a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. *The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.*

Id. at 570-71 n.10 (emphasis added). The Supreme Court thus refused to assume that black citizens of Montgomery would suffer "cognizable injury" from, and thereupon have the requisite standing to challenge, any use of public recreational facilities by private school groups, even those groups with racially discriminatory admissions policies. Instead, because nonexclusive use,

by definition, meant that facilities were available to other persons, the Court indicated that an examination of challenges to such uses should focus upon their actual impact upon plaintiffs. Those plaintiffs who could successfully establish some such injury would demonstrate the personal stake in the controversy necessary to the invocation of judicial relief.

In this brief glance at standing, the Court made clear that in cases concerning alleged racial discrimination, as elsewhere, both the constitutional and prudential limitations upon the exercise of judicial power must be observed. That such limits were observed in *Gilmore* and *Norwood* seems evident. In *Norwood*, the plaintiffs, parties to a school desegregation order, challenged the constitutionality of a Mississippi state law that authorized the provision of free textbooks to *all* schoolchildren regardless of the admissions policies of the schools they attended. The relief they sought and obtained would thus end state aid to discriminatory schools and was therefore "directly related to the concrete injury they suffered." *Id.* In *Gilmore*, the plaintiffs, parties to an action desegregating public parks, challenged the exclusive use of facilities that "created, in effect, 'enclaves of segregation'" and thus deprived them of equal access to recreational facilities. *Id.* at 566. The relief they sought and obtained would thus end state action that "operated directly to contravene an outstanding school desegregation order." *Id.* at 568.[5]

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[5] The essential distinction, therefore, between these cases and the one at hand is the predicate of discrimination established in both cases. This predicate was also established in *Green*. Upon the granting of temporary injunctive relief, the three-judge court adopted the contemporaneous findings made by a Mississippi federal court in Coffey v. State Educ. Finance Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969). Green v. Kennedy, 309 F. Supp. at 1134. The Mississippi court had found that certain named private schools had been

Similar observance of these limitations requires that this court determine initially whether the plaintiffs here have "suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).[6] In this case plaintiffs allege two injuries. First, they allege that the exemptions granted by the IRS "constitute tangible financial aid and other assistance to racially segregated education." Complaint at 3, Appendix at 11. Second, they allege injury that is, at first glance, similar to that alleged in *Gilmore:* interference "with the efforts of fed-

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formed for the purpose of frustrating the court-ordered desegregation of the public schools in that state. More to the point, however, is the conclusive evidence offered by that court's opinion of the racially discriminatory admissions policies of a large number of Mississippi private schools. *Coffey*, 296 F. Supp. at 1393 (Appendix A). No allegation of discriminatory practices or policies is made by the plaintiffs before us.

Another more recent decision is also distinguishable on this basis. Moton v. Lambert, 508 F. Supp. 367 (N.D. Miss. 1981). In this case plaintiffs sought injunctive relief against state assistance to allegedly racially *discriminatory* schools. *See* Second Amended Complaint, filed Feb. 13, 1981, in Moton v. Lambert.

[6] Analysis of this question often takes place under the rather undifferentiated concept of "personal stake." *See, e.g.*, Citizens Concerned For Separation of Church and State v. City and County of Denver, 628 F.2d 1289, 1297 (10th Cir. 1980); NAACP, Boston Chapter v. Harris, 607 F.2d 514, 523 (1st Cir. 1979). This phrase is totally absent from the majority opinion.

However the question is approached, this court has made clear that "the *basic concern* of the standing doctrine is that *the individual complaining party have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure.*" Harrington v. Bush, 553 F.2d 190, 206 (D.C. Cir. 1977). As I explain *infra*, these plaintiffs have failed to allege any such connection.

eral courts, HEW and local school authorities to desegregate racially dual school systems." *Id.* The allegations of *actual injury* made here must be uncovered with some care.

The majority opinion apparently holds that the "very act by the IRS of according tax exemption to a school that discriminates . . . causes immediate injury to [plaintiffs] and that is the only injury for which they seek redress." Maj. op. at 14. In other words, because plaintiffs allege the violation of their constitutional rights, they have alleged injury. This approach apparently adopted by the court today postulates unlimited judicial power. The Supreme Court has rejected similar attempts to circumvent the limitations imposed by Article III. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), to take only one example, plaintiffs alleged that specific city and county officials had engaged in various patterns and practices of conduct, systematically depriving plaintiffs of their constitutional rights. Under the approach adopted by the court today, it would seem that these plaintiffs, by alleging violation of their rights, had alleged injury sufficient to confer jurisdiction upon a federal court. The Supreme Court, however, reached a different conclusion. After examining closely the *allegations of injury* placed before it, the Court determined that while plaintiffs had alleged the violation of constitutional rights, "[n]one of the named plaintiffs [was] identified as himself having suffered any injury in the manner specified." *Id.* at 495. On that basis the Court denied plaintiffs standing. This decision in and of itself thus forbids the approach advanced by the majority today. *See also Laird v. Tatum*, 408 U.S. 1 (1971) (alleged violation of First Amendment rights no substitute for specific injuries).

The second injury that plaintiffs claim—interference with their court-ordered right to a desegregated public

education—does not represent actual injury because plaintiffs fail to allege the necessary components of such a claim. "Interference" only takes place upon the actual violation of plaintiffs' constitutional rights: in this context, through the use by private schools of racially discriminatory admissions policies.[7] The complaint does not allege discrimination by these named schools against these plaintiffs. Although it is somewhat difficult to ascertain from its anfractuous opinion, the majority apparently reads into this complaint the allegation that the target schools therein mentioned discriminate on racial grounds. *See, e.g.*, maj. op. at 17 n.24 ("the heart of plaintiffs' complaint is that government [] grac[es] racially *discriminatory* educational facilities with tax-exempt status . . . .") (emphasis added). I think it unnecessarily generous so to replead the plaintiffs' complaint. For lack of a specified claim of discrimination, therefore, the complaint must fail as an attempt to invoke judicial relief against actions by a third party, here the Internal Revenue Service, for allegedly contributing to "interference" with a court-ordered right to desegregated education.[8]

What the plaintiffs actually challenge here is the *adequacy of agency enforcement procedures*, arguing that

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[7] *See generally* Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111 (1976). Once private discrimination is established, of course, this "interference" in the form of a tax exemption can be enjoined should it be found to constitute "state action." This question was not passed upon by the district court and is not before us today. *See generally* Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 61-74 (1972).

[8] I have noted elsewhere that the allegation that the government funds unlawful discrimination "without regard to whether [the plaintiffs] personally are victims of the discrimination" does not constitute a distinct and palpable injury sufficient to confer standing to sue in the federal courts. Nat'l Black Police Ass'n v. Velde, 631 F.2d 784, 788, 789-90

the IRS has failed to weave its net of enforcement fine enough to catch all of the private schools that may discriminate on the basis of race. The majority concludes that such a contention is sufficient to confer jurisdiction upon a federal court. This approach to the question of standing mandates continuing judicial supervision of all public agencies whose enforcement of the law touches upon the constitutional rights of citizens. *Cf. Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1069-70 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). Such an approach cannot be justified.

Under Supreme Court precedent, this contention cannot support a federal court's exercise of jurisdiction. As this court recently noted, such precedent makes clear that an

> asserted interest in the proper administration of the laws is a generalized one shared by all other citizens. Such an abstract injury is insufficient for standing. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 217, 219-21 . . . . In *Reservists*, the Supreme Court held that standing to sue may not be predicated upon an interest that is held in common by all members of the public, such as is present in this case . . . . Although the proper administration of the laws serves the interests of all, "[t]he proposition that all [laws] are enforceable by any citizen simply because citizens are the ultimate beneficiaries . . . has no boundaries." *Id.* at 226-27.
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n.7 (D.C. Cir. 1980) (Tamm, J., concurring in part, concurring in result in part, and dissenting in part), *cert. granted*, 49 U.S.L.W. 3824 (U.S. May 4, 1981) (No. 80-1074). **Because the plaintiffs in this case fail to allege unlawful discrimination on the part of any school, I need not decide the question of whether a named plaintiff must have himself been subjected to discriminatory practices or whether the right to a court-ordered desegregated education affords him the "personal stake" necessary for the invocation of federal judicial relief.**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

WILLIAM SIMON, ET AL., DEFENDANTS,

W. WAYNE ALLEN, INTERVENOR.
807 Shady Grove Road South
Memphis, Tennessee 38138
Telephone: (901) 767-1205

MOTION TO INTERVENE AS A DEFENDANT

W. WAYNE ALLEN (hereinafter referred to as "Applicant") moves for leave to intervene as a Defendant in this action, and shows to the Court as follows:

1. Briarcrest Baptist School System, Inc., (hereinafter referred to as "Briarcrest") is located in Memphis, Tennessee, and presently qualifies under Section 501(c) of the Internal Revenue Code of 1954 (hereinafter referred to as the "Code") and Rev. Proc. 75-50 as a tax-exempt institution.

2. Applicant is a parent and has chosen to send his three (3) children, Melody Lynne Allen (age 13); Michelle Lee Allen (age 11); and Carl William Allen, II (age 6), to Briarcrest and these children are presently attending said School System.

3. Applicant has contributed frequently to Briarcrest, which contributions presently qualify for treatment as charitable deductions under Section 170(c) of the Code, and Applicant desires and intends to continue to make contributions to Briarcrest in the future.

4. The Complaint filed in this suit seeks declaratory and injunctive relief against the government defendants, the effect of which would be to deprive many private schools of qualification under Section 501(c) of the Code and to deprive contributors of such schools of the federal income tax deductions now allowed by Section 170(c) of the Code; and

said Complaint expressly names Briarcrest as one of the schools intended to be affected by the relief sought by plaintiffs.

The revocation of tax exempt status would greatly injure the ability of Birarcrest to raise funds for any capital purposes, including improvements and expansion of educational facilities, and would substantially increase the effective net cost thereof, thereby ultimately affecting the quality of education and its cost to the students; and such revocation of tax exempt status would deprive Applicant of his right to deduct for federal income tax purposes contributions made to Briarcrest.

Applicant is an adherent of the Christian faith and has chosen to have his children educated at Briarcrest, because that school is grounded in the Christian faith, and the moral and philiosophical principles underlying its pedagogy are designed to instill into its students the faith, beliefs, values, morals and life-style of the Christian faith as followed by Applicant. The deprivation of tax exempt status to Briarcrest, on the basis of the standards proposed by the plaintiffs herein, would seriously and detrimentally affect the rights of Applicant, under the First Amendment to the United States Constitution, to have his children educated in the school of his choice.

The deprivation of rights of the Applicant, which would follow from a grant of the relief sought by plaintiffs, would violate Applicant's rights under the Fifth Amendment, because such deprivation of rights would have been accomplished without affording him any of the elements of due process of law.

5. Applicant therefore has a right to intervene, as an indispensable party herein, pursuant to Rule 24(a)(2) of the Rules of Civil Procedure, on the following grounds:

(a) The Applicant has an interest relating to the property or transaction which is the subject of the action, as set forth hereinabove; and

(b) The disposition of this action may, as a practical matter, impair or impede his ability to protect his interest, because:

i. the purpose of this suit is to accomplish a change in the income tax regulations by which plain-

tiffs intend to deprive Briarcrest of tax exempt and deductibility status without further procedures; and

ii. even if the Applicant and Briarcrest are not bound by the judgment of this cause, the decision would at least stand as a precedent in any litigation they might initiate. In any new suit Applicant would be seeking to overturn, in federal court, a judgment already rendered by a federal court.

(c) The Applicant's interests herein are not represented by the Defendants because Applicant's primary interests are in preserving the tax-exempt status of Briarcrest, his right to claim tax deductions for contributions to Briarcrest, and his constitutional right to educate his children in the school of his choice, interests which are, at least in some respects, adverse to those of the government officials who are the nominal Defendants.

6. Applicant further alleges that he should be permitted to intervene under Rule 24(b)(2) of the Rules of Civil Procedure, on the following additional grounds:

(a) Applicant's claim or defense and the main action have a question of law or fact in common in that the central issue in this suit is the legality of Rev. Proc. 75-50, which presently allows Briarcrest to qualify as a tax-exempt organization, and thereby makes deductible Applicant's contributions to Briarcrest, whereas the relief sought by Plaintiffs would destroy Briarcrest's tax-exempt status and Applicant's right to deduct contributions to it, and would impinge upon Applicant's right to educate his children in the school of his choice, arbitrarily and without regard for the good faith efforts by Applicant and Briarcrest to attract black students to the School.

(b) The intervention sought will not unduly delay or prejudice the adjudication of the rights of the original parties.

7. Attached hereto is a copy of Motion of Defendant W. Wayne Allen to dismiss Plaintiff's Complaint. The pleading sets forth the present claim or defense for which intervention is sought.

Dated:

MARTIN, TATE, MORROW & MARSTON, P.C.
705 Union Planters National Bank
Building
Memphis, Tennessee 38103
(901) 525-5881

By: George E. Morrow (PD)
GEORGE E. MORROW
Attorneys for W. Wayne Allen

OF COUNSEL:

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
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(202) 331-4100

By: Phillip D. Bostwick
PHILLIP D. BOSTWICK
JAMES THOMAS LENHART

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1355-69

WILLIAM H. GREEN, ET AL., PLAINTIFFS,

v.

JOHN B. CONNALLY, ET AL., DEFENDANTS.

—and—

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS.

TUESDAY, MAY 17, 1977
WASHINGTON, D.C.

The above-entitled matter came on for hearing on motions before THE HONORABLE JOSEPH C. WADDY, United States District Judge, at 10:00 a.m.

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

FRANK R. PARKER, *Esquire*
WILLIAM E. CALDWELL, *Esquire*
PAUL L. JOFFE, *Esquire*
ROBERT H. KAPP, *Esquire*

VERNELL A. MARSHALL
Official Court Reporter

ON BEHALF OF THE DEFENDANTS

DONALD J. GAVIN, *Esquire*
JOHN B. CUNNINGHAM, *Esquire*

ON BEHALF OF THE
DEFENDANT-INTERVENOR:

GEORGE E. MORROW, *Esquire*
JAMES THOMAS LENHART, *Esquire*

* * * * *

[106] **THE COURT'S FINDINGS AND CONCLUSIONS**

THE COURT: With respect to the motion of the Government and the Intervenor to dismiss—the Government only

in Green to dismiss—that motion is denied. The Court is clear in its own mind that so far as Green is concerned, the plaintiffs there have a right to proceed to determine whether or not that there has been good-faith compliance with the Order of this Court and if not, then the Court has the [107] duty and responsibility to amend or supplement its prior Decree in such manner as to affect the purposes of the original Decree.

The Court disagrees with counsel for the Government that there has been a change in the law, or a change of circumstances which dictate that Green be dismissed.

The motion of the Government to dismiss in Green is denied.

With respect to the motions of the Government and of the Intervenor in the case of Wright, the Court will take this matter under consideration and under advisement and in due time will make a decision.

Mr. Parker, will you provide the Court an order in Green denying the motion...

MR. PARKER: Yes, Your Honor, we have.

THE COURT: ...and the matter is under advisement, so I won't need an order in that. And Mr. Morrow, you're going to present me an order granting you leave to intervene and...

MR. MORROW: Yes, sir.

THE COURT: ...if you prefer to have a withdrawal of your motion as amicus curiae, you may withdraw it, or otherwise it's denied. The allowance of Reverend Allen to intervene and to file his motion does not carry with it a right to file the other papers...

[108] MR. MORROW: Yes, sir.

THE COURT: ...that were attached thereto and they are stricken.

MR. MORROW: Yes, sir.

MR. PARKER: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. PARKER: Nothing further, Your Honor.

[Whereupon, subject proceedings were concluded at 12:55 p.m.]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1355-69

WILLIAM H. GREEN, ET AL., PLAINTIFFS,

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS.

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS.

ORDER DENYING MOTION TO DISMISS

Defendants in *William H. Green, et al.* v. *W. Michael Blumenthal, et al.*, Civil Action No. 1355-69, having filed a motion to dismiss, and the Court having held a hearing on the motion on May 17, 1977, and having considered the pleadings, memoranda, and arguments of counsel on the motion, and being fully advised in the premises, and having rendered its opinion from the bench on May 17, 1977 that the motion is not well-taken and should be denied, it is therefore, in accordance with this Court's bench opinion of May 17, 1977,

ORDERED that the motion to dismiss filed in Civil Action No. 1355-69 be, and the same is hereby, denied.

/s/ Joseph C. Waddy

JOSEPH C. WADDY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426
Filed May 27, 1977

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS,
W. WAYNE ALLEN, INTERVENOR.

ORDER PERMITTING INTERVENTION OF W. WAYNE ALLEN ALLOWING WITHDRAWAL OF MOTION FOR *AMICUS* BRIEF, ALLOWING FILING OF BRIEF BY INTERVENOR, AND STRIKING FACTUAL EXHIBITS

This cause came on to be heard upon the following motions:

Motion of Briarcrest Baptist School system, Inc. of Memphis, Tennessee to file a brief *amicus curiae*, which motion was accompanied by the proposed brief and was supported by six factual exhibits; and

Motion of W. Wayne Allen of Memphis, Tennessee to intervene as a party defendant in this action, which motion was accompanied by a motion of said defendant intervenor to dismiss the plaintiffs' complaint;

And upon briefs and oral argument of counsel with respect to said motions to file brief *amicus curiae* and to intervene;

And it appearing to the Court that notice of said motions have been duly served on all parties to this cause and that petitioner W. Wayne Allen should be allowed to become a party defendant intervenor in the cause as prayed;

And it further appearing that said intervenor should be permitted to file a brief in support of his motion to dismiss, and that he has adopted the brief of Briarcrest Baptist School System, Inc. of Memphis, Tennessee in support of said motion, so that there is no need for said brief to be filed as a brief *amicus curiae;*

And it further appearing that the factual exhibits attached to the motion to file brief *amicus curiae* are not properly a part of the record in the cause;

NOW, THEREFORE, IT IS ORDERED:

1. That petitioner W. Wayne Allen is granted leave to intervene as a party in this cause and to file his motion to dismiss and to adopt the brief *amicus curiae* of the Briarcrest Baptist School System, Inc. as his own and to participate in the cause in all respects as a full party thereto;

2. That the factual exhibits attached to the motion to file said *amicus curiae* brief are hereby stricken from the record, without prejudice to their presentation in a proper manner at a later stage of the proceedings; and

3. The request of counsel in open Court to withdraw the motion of the Briarcrest Baptist School System, Inc. to file brief *amicus curiae* is granted and said motion is deemed withdrawn.

/s/ Joseph C. Waddy

JOSEPH C. WADDY
United States District Judge

DATE: MAY 27, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

WILLIAM SIMON, ET AL., DEFENDANTS,

W. WAYNE ALLEN, INTERVENOR.

MOTION OF INTERVENOR W. WAYNE ALLEN TO DISMISS PLAINTIFFS' COMPLAINT

Comes now the intervenor, W. Wayne Allen, and moves this Court pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss plaintiffs' complaint upon the following grounds:

(1) The plaintiffs lack standing to sue.

(2) Plaintiffs have failed to join indispensable parties under Rule 19, said parties being all the private schools and all the contributors to such schools who have interests in the subject matter of this suit, the protection of which would as a practical matter be impaired or impeded by their absence from this suit.

(3) Plaintiffs have failed to state a claim upon which relief can be granted.

(4) The Court lacks jurisdiction over the subject matter of this action.

(5) Plaintiffs' action is nonreviewable.

(6) Plaintiffs' action is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

(7) Plaintiffs' action is barred by the federal tax exception to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

(8) Plaintiffs' action is barred by the doctrine of sovereign immunity.

In support of the above grounds, intervenor refers the Court to the Memorandum In Support of Motion By Defendants To Dismiss Plaintiffs' Complaint, which was filed herein by the government defendants and to the Memoran-

dum of Briarcrest Baptist School System, Inc., *Amicus Curiae* In Support of Government Motion To Dismiss.

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PHILLIP D. BOSTWICK
JAMES THOMAS LENHART

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS.

DEFENDANTS' TRANSMITTAL OF PROPOSED GUIDELINES FOR PRIVATE SCHOOL RACIAL NON-DISCRIMINATION

For the information of the court, defendants, by their attorneys, herewith respectfully transmit the attached proposed guidelines of the Internal Revenue Service for determining whether certain private schools claiming tax exemption are racially non-discriminatory. These proposed guidelines, in the form of a proposed revenue procedure published for public comment, were announced by the Internal Revenue Service on August 21, 1978, and appeared in the Federal Register on August 22, 1978. Defendants believe that these proposed guidelines may ultimately have a significant effect in this litigation.

RESPECTFULLY SUBMITTED,

/S/ John J. McCarthy

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DONALD J. GAVIN
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OF COUNSEL:

EARL J. SILBERT
United States Attorney
for the District of Columbia

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
PUBLIC AFFAIRS DIVISION
Washington, DC 20224

NEWS RELEASE

Washington, D.C.—Proposed guidelines to determine whether certain private schools claiming tax exemption are racially non-discriminatory were announced today by the Internal Revenue Service.

The guidelines, in the form of a proposed revenue procedure published for public comment, are attached and will also appear in the Federal Register of Aug. 22, 1978.

The proposed revenue procedure deals primarily with procedures to be employed by the Internal Revenue Service in cases of private elementary and secondary schools which have been adjudicated by a court or agency to be racially discriminatory or which were created or substantially expanded at or about the time of public school desegregation in the community and have little or no minority student enrollment.

Comments on the proposed procedure should be sent to the Commissioner of Internal Revenue, 1111 Constitution Ave., N.W. Washington, DC 20224, Attention: E:EO. Comments should be sent so that they are received by Oct. 23, 1978.

The revenue procedure will not be effective until public comments have been considered.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

Civil Action 76-1426
Consolidated with CA 69-1355
GREEN *v.* MILLER

INEZ WRIGHT, ET AL

vs.

MILLER ET AL

Washington, D.C.
November 20th 1979

MOTION OF DEFENDANTS TO DISMISS

The above-entitled matter came on for hearing before THE HONORABLE GEORGE L. HART, JR., United States Judge, pursuant to notice, at 10:00 a.m.

APPEARANCES:

On behalf of the Plaintiffs:

ROBERT A. MURPHY *Esq*
ROBERT H. KAPP *Esq*
NORMAN J. CHACHKIN *Esq*
RICHARD KOHN *Esq*
FRANK PARKER *Esq*
& MARY ANN DETERMAN *Esq*

On behalf of the Defendants:

DONALD J. GAVIN, *Esq*,
Department of Justice
PHILLIP D. BOSTWICK *Esq*
GEORGE E. MORROW *Esq*,
Counsel for Intervenor,
MICHAEL KEARNS *Esq*
THOMAS LENHART *Esq*
PAUL JAFFE *Esq*.

JOAN CURTIS BLAIR
Official Court Reporter

* * * * *

[64] [MR. MORROW:] However, no one in this case has yet said that the thirty five hundred target schools in this case are discriminatory schools.

There has been no allegation that they are, and if they were, counsel for the plaintiffs have totally failed to show the Court how the remedy which they are seeking would help their plaintiffs to eliminate any specific, concrete harm.

Finally, Mr. Jaffe said that the complaint named schools which are, as he put it, slipping through the net.

I have to take issue with Mr. Jaffe on that point. As I read the complaint, I find no allegation that any of the named schools in the complaint are actually discriminating against Negro students at this time.

MR. KAPP: May I be heard briefly, Your Honor?

THE COURT: All right.

MR. KAPP: I would just like to make several brief comments if I would, Your Honor—one is on the point that the nature of the relief that we are seeking is more stringent than the Internal Revenue service was prepared to issue administratively, I can only say this, Your Honor, that the precise nature of the relief is an issue which should be determined after the case has been fully tried and there has [65] been full discovery.

We need not really address today precisely what the nature of that relief would be. That would be determined after all the evidence was in, and that doesn't at all affect the standing question.

I would just like to make a further comment in respect of government counsel's suggestion that we have not addressed the three cases on which they have relied. EKRO—The Travel agents case and Tax Analysts.

The fact is that we have rather fully discussed these cases in our brief and I would just like to make these general comments about each:

In the case of EKRO, it is by reason of the difference in the injury claim that EKRO is distinguishable, because in EKRO the injury alleged was not the Internal Revenue Service conduct, but the denial of hospital care to indigent patients. The Supreme Court rightly held that plaintiffs lacked standing because they had failed to allege a causal connection between the Internal Revenue Service ruling and the refusal of hospital services, and further because

there was no likelihood that the reversal of IRS policy would make hospital care available.

Here, however, the claim is that the Internal Revenue Service [66] conduct, in and of itself, injures the plaintiff and that termination of that conduct will fully redress the injury to plaintiffs.

Now, turning to the Tax Analyst case if I may for just a moment—there the standing which was claimed in one respect was standing as a taxpayer and the court held that the problem there was that the taxpayer was claiming a generalized injury, undifferentiated from that in respect of the rest of the population of the United States—the rest of the citizenry of the United States.

That is not the case here.

This injury falls upon the Black parents of Black school children attending public schools who are injured by the support given to the private schools and, secondly—

THE COURT: What is their injury?

MR. KAPP: Their injury, Your Honor, is an infringement of their Constitutional right to be free of governmental support of private school discrimination and that is the kind of support which was recognized to cause injury to the plaintiffs—

THE COURT: Don't they go to desegregated schools?

MR. KAPP: They do go to desegregated schools, Your [67] Honor, but they are entitled—they are entitled as a matter of Constitutional principle—

THE COURT: And they could go to any one of these schools if they want to, couldn't they?

MR. KAPP: I don't know whether they would be—admitted or not to these schools.

THE COURT: Well if they weren't—they would be put in quickly if they qualified.

MR. KAPP: You are talking about public schools Your Honor—or private schools?

THE COURT: What is that?

MR. KAPP: You are talking about public schools, Your Honor?

THE COURT: No—no. I am talking about the private schools.

MR. KAPP: Private schools—I don't know whether they would be admitted or not.

THE COURT: Well if you find one that is not admitting them on account of race, we can take care of it very quickly.

MR. KAPP: I think we have indicated what our position is on that, Your Honor.

THE COURT: Yes—all right.

[68] MR. KAPP: Just taking the second leg of the Tax Analyst case, standing was alleged there based upon a competitive injury and the fact is that standing was turned down on the grounds that the plaintiff was not within the zone of interest which was covered by the Tax Statute that was there being challenged.

Here I think nobody would question the fact that these Black schoolchildren are within the zone of interest protected by the Fifth Amendment.

Finally, in the Travel Agents case, the case failed for lack of standing on the grounds that there was no specificity of allegations of a competitive injury. Here there were judicially recognized Constitutional violations of which we are complaining.

Thank you, Your Honor.

THE COURT: Very well. We will take the matter under advisement.

(Whereupon the hearing was concluded at 11:49 pm)

/s/ _____

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426
Filed 11/26/79

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

G. WILLIAM MILLER, ET AL., DEFENDANTS

ORDER

Defendants having moved for dismissal of plaintiffs' action, and plaintiffs having opposed this motion, and all pertinent issues having been fully briefed and argued, it is this 26th day of November, 1979, hereby ORDERED and DECREED, that defendants' motion is GRANTED and that "the *Wright* component" of this action is DISMISSED WITH PREJUDICE. The remaining issue of the "*Green* component" of this action (formerly C.A. 69-1355) has been limited to whether or not defendants have complied with the injunction issued by the three judge court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

/s/ George L. Hart, Jr.

GEORGE L. HART, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426
Filed Dec. 18, 1979

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

G. WILLIAM MILLER, ET AL., DEFENDANTS,

ORDER

The plaintiffs in *Green* v. *Miller*, Civil Action No. 1355-69, having moved pursuant to Rule 59(e) and 60(a), F.R. Civ. P. for this Court to delete any reference from its judgment order in *Wright* v. *Miller* concerning the scope of the issues involved in the *Green* case, and

It appearing that *Green* v. *Miller* is a discrete component of this litigation, and that the Court's judgment order pertains only to *Wright* v. *Miller*, it is

ORDERED, that the following language shall be *deleted* from the judgment order in *Wright* v. *Miller*, and shall form no part of the judgment in that case:

> The remaining issue of the "*Green* component" of this action (formerly C.A. 69-1355) has been limited to whether or not defendants have complied with the injunction issued by the three-judge court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

The judgment order is amended accordingly.

/s/ George L. Hart
HON. GEORGE L. HART
United States District Judge

Dated: DECEMBER 18, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426
Filed Jan. 25, 1980

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

G. WILLIAM MILLER, ET AL., DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that Inez Wright, et al., plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order dismissing plaintiffs' action with prejudice entered on the 26th day of November 1979, as amended December 18, 1979.

/s/ Norman J. Chachkin

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Attorneys for the Plaintiffs

Dated: JANUARY 25, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Filed June 18, 1981
Civil Action No. 76-1426
No. 80-1124

INEZ WRIGHT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT, AND EPHRON ANTONI WRIGHT, JR., ET AL., APPELLANTS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

APPEAL FROM the United States District Court for the District of Columbia.

Before: WRIGHT, TAMM and GINSBURG, Circuit Judges

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for proceedings consistent with the opinion of this Court filed herein this date.

PER CURIAM
FOR THE COURT
/s/ George A. Fisher
Clerk

Date: JUNE 18, 1981

Opinion for the Court filed by Circuit Judge Ginsburg.
Dissenting opinion filed by Circuit Judge Tamm.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1124
INEZ WRIGHT, ET AL., PLAINTIFFS-APPELLANTS,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
DEFENDANTS-APPELLEES.

No. 82-_____

WILLIAM H. GREEN, ET AL., PLAINTIFFS-APPELLANTS,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
DEFENDANTS-APPELLEES

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR INJUNCTION PENDING APPEAL OR IN THE ALTERNATIVE FOR INJUNCTION UNDER "ALL WRITS ACT" TO PRESERVE EFFECTIVENESS OF THIS COURT'S MANDATE

Plaintiffs-appellants in these cases request that this Court enter its Order enjoining the defendants-appellees Secretary of the Treasury and Commissioner of Internal Revenue from granting or restoring federal tax-exempt status under 26 U.S.C. § 501(c)(3) to any school which does not have a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment issued by the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971). As we show *infra*, plaintiffs-appellants are entitled to this remedy under F.R. Civ. P. 62(g) as an injunction

pending their recent appeal in *Green* v. *Regan* from the district court's February 4, 1982 refusal of further injunctive relief. Should the Court, however, wish to reserve the question of the remedial scope of *Green* for resolution at a later stage of the appeal rather than to decide it preliminarily in connection with the issuance of an injunction *pendente lite*, the Court is fully authorized also to grant the injunction under 28 U.S.C. § 1651 (the "All Writs Act") to preserve the *status quo* and to maintain the potential effectiveness of this Court's mandate in *Wright* v. *Regan*.

Background: How the Issue Arises

1. This Court accurately summarized the history of the *Green* litigation and the commencement of the *Wright* case in its June 18, 1981 decision. *Wright* v. *Regan*, 656 F.2d 820, 823-26 (D.C. Cir. 1981).

2. The original declaratory judgment of the three-judge court, *Green* v. *Connally*, *supra*, 330 F. Supp. at 1179, was implemented by the Internal Revenue Service on a nationwide basis through adoption of Rev. Rul. 71-447, 1971-2 C.B. 230 and subsequent Revenue Rulings and Revenue Procedures. Pursuant to these policies, the IRS revoked the tax-exempt status of racially discriminatory schools within and also outside the State of Mississippi. *See, e.g.*, *Prince Edward School Foundation* v. *United States*, 478 F. Supp. 107 (D.D.C. 1979), *aff'd mem.* No. 79-1622 (D.C. Cir., June 30, 1980), *cert. denied*, 67 L. Ed. 2d 376 (1981).

3. From July 10, 1970, *see Green* v. *Connally*, *supra*, 330 F. Supp. at 1156, until January 8, 1982, the defendants in these cases, in their administration of the tax laws, maintained and applied the interpretation of Sections 501(c)(3) and 170(a)-(c) of the Internal Revenue Code announced in the declaratory judgment in *Green* and adopted in Rev. Rul. 71-447.

4. From the time that the *Green* case was reopened in 1976, and from the time that the *Wright* case was filed in 1976, therefore, these two actions have concerned the standards and procedures used by the IRS in carrying out the interpretations of Sections 501(c)(3) and 170(a)-(c) an-

nounced in the *Green* declaratory judgment. *See Wright* v. *Regan*, *supra*, 656 F.2d at 825-26, 838 at n.62.

5. On January 8, 1982, the Department of the Treasury declared that it would no longer deny tax-exempt status to private schools which practiced racial discrimination, and that it had undertaken the steps necessary to restore tax exemptions to two institutions whose exempt status had been denied or revoked because of their discriminatory policies, Bob Jones University and Goldsboro Christian Schools, Inc. *See Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981); *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.* 644 F.2d 879 (4th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981). (The Treasury Department's News Release is attached as Exhibit "2" to the *Green* plaintiffs' January 13, 1982 district court motion, which is reprinted in the accompanying Appendix at 11a-15a.)

6. On the same date, January 8, 1982, the United States filed a Memorandum with the Supreme Court of the United States in the *Bob Jones* and *Goldsboro* cases in which it advised the Supreme Court that the process of restoring tax exemptions to the two schools had begun, and also that the Internal Revenue Service had commenced the steps necessary "to revoke forthwith" Rev. Rul. 71-447 and subsequent Revenue Rulings and Revenue Procedures through which the Service had effectuated the original declaratory judgment in *Green*. (The January 8 submission to the Supreme Court is attached as Exhibit "1" to the *Green* plaintiffs' January 13 district court motion, which is reprinted in the Appendix submitted to the Court with this motion at 8a-10a.)

7. Since the January 8 announcement, the government has changed its posture on the matter several times, *inter alia* indicating that it would continue to comply with the injunctive decree (and, hence, with the declaratory judgment) in *Green* as to Mississippi private schools, and that it would not act on applications for tax-exempt status from racially discriminatory private schools outside Mississippi

(except for Bob Jones University and Goldsboro Christian Schools, Inc.) until Congress considered proposed legislation submitted by the President on January 18, 1982. (The factual developments can be traced in the pleadings and exhibits in the district court in *Green* from January 13, 1982 to date; *see* Appendix submitted herewith.)

8. The current status of the matter is that the government still intends to restore tax-exempt status to Bob Jones University and Goldsboro Christian Schools, Inc.—two institutions with admittedly racially discriminatory policies—and reserves the authority thereafter to return and to grant exemptions to other discriminatory schools should Congress fail to enact the measure recommended on January 18, 1982.

9. In light of the government's threatened action in contravention of the declaratory judgment in *Green*, on January 13, 1982 the plaintiffs in that case sought further injunctive relief from the U.S. District Court for the District of Columbia (*see* Appendix submitted herewith, at 1a-30a). However, on February 4, 1982 the district court ruled that the Green case was limited to Mississippi private schools only, and therefore refused to enjoin the government from taking action to grant or restore tax exemptions to racially discriminatory private schools outside Mississippi. (The district court's Order denying further injunctive relief appears at 89a of the accompanying Appendix.)

Reasons for Granting Injunctive Relief

10. As demonstrated in the papers submitted in support of the *Green* plaintiffs' January 13 motion in the district court, we believe that the 1971 declaratory judgment in *Green* has nationwide application and effect, and was so intended by the three-judge court. That declaratory judgment announces the proper construction of §§501(c)(3) and 170(a)-(c)—Code provisions of nationwide application—on a nationwide basis. As the three-judge court's 1971 opinion said, "[t]he construction upheld today applies to *all* private schools practicing racial discrimination." 330 F. Supp. at 1164 (emphasis added); *see also Wright* v. *Regan*, *supra*, 656 F.2d at 824. The three-judge court made perfectly clear

that the declaratory judgment applies to all racially discriminatory private schools, wherever situated, when it said:

> To obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi ... Our *injunctive decree* is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of *this aspect of our relief* to schools in Mississippi

was appropriate. 330 F. Supp. at 1174 (emphasis added). Obviously, the *other aspect of the relief*—the declaratory judgment—has nationwide application. That declaratory judgment, which did not turn upon the geographic location of racially discriminatory private schools, is binding upon defendant federal officials.

11. The reach of the declaratory judgment in *Green* cannot be any less if it is to be effective in granting plaintiffs the relief to which they were long ago held entitled in that case. Sections 501(c)(3) and 170 of the Internal Revenue Code are nationwide in scope; there cannot be one law for taxpayers in Mississippi and another for identically situated taxpayers in other States. *See International Business Machines Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl. 1965). The Internal Revenue Service has always recognized this principle as, for example, when it effectuated the declaratory judgment on a nationwide basis by adopting Rev. Rul. 71-447, which it now proposes to rescind.

12. The declaratory judgment could not be effective even in Mississippi if the Internal Revenue Service is free to interpret the basic substantive provisions of the Code (§§ 501(c)(3) and 170) differently as to identically situated schools outside Mississippi. That course would inevitably open up the declaratory judgment to collateral attack on grounds of unfairness and lack of uniformity. If the tax-exempt status of any racially discriminatory schools— including Bob Jones University and Goldsboro Christian Schools, Inc.—is restored by the defendants, it is entirely predictable that other private racially discriminatory schools (including Mississippi schools) will bring refund

suits or declaratory judgment actions under 26 U.S.C. § 7428 on the basis that they are indistinguishable from discriminatory institutions such as Bob Jones and Goldsboro, whose exemptions were restored by the defendants.

13. Furthermore, the *Wright* litigation has, since its inception, proceeded on the assumption that the defendants are obligated to and are following the *Green* declaratory judgment's construction of the Code, which requires the Internal Revenue Service to deny exemptions to racially discriminatory private schools. As this Court remarked in *Wright* v. *Regan*, *supra*, 656 F.2d at 833:

> Our starting point is a proposition not disputed in this litigation or in conflict with the appropriations riders: racially discriminatory institutions are ineligible for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. As the court held in *Green* v. *Connally*, schools that do not adopt and administer nondiscriminatory admissions practices do not qualify for tax benefits otherwise available to nonprofit educational organizations.

(footnote omitted.) This Court's decision in *Wright*, and its mandate (which has been stayed pending disposition of petitions for certiorari filed by the government and the intervenor) are intended to permit plaintiffs to litigate "a claim for relief regarding the administration of section 501(c)(3)." *Id.* at 838, text at n.62. If the defendants are permitted, especially while the district court awaits ultimate release of this Court's mandate, to change their basic interpretation of Section 501(c)(3) and to restore tax exemptions to even a few racially discriminatory schools, plaintiffs will be deprived of the opportunity to obtain fully effective relief on remand.

14. Unless the government is restrained *pendente lite* from restoring and/or granting tax-exempt status under Section 501(c)(3) to racially discriminatory schools outside Mississippi, the declaratory judgment in *Green* will be subject to collateral attack as described above. The federal courts have the power and the duty to protect their judgments from such attack. *E.g.*, *Teas* v. *Twentieth-Century Fox Film Corp.*, 413 F.2d 1263, 1266-67 (5th Cir. 1969); *see Powell* v. *McCormack*, 395 U.S. 486, 499 (1969); 6a

Moore's Federal Practice §57.10 at 57-77—57-78 (2d ed. 1969). Similarly, absent restraint from this Court, plaintiff's right to complete and effective relief in *Wright* will be seriously eroded, and this Court has ample authority to preserve the effectiveness of its future judgments. *See, e.g., Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 425-26 (1965).

15. Plaintiffs-appellants have therefore met the requirements for the issuance of *pendente lite* relief. *See Federal Trade Comm'n* v. *Weyerhaeuser Co.*, 648 F.2d 739 (D.C. Cir. 1981) and *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), both following *Virginia Petroleum Jobbers Ass'n* v. *Federal Power* Comm'n, 259 F.2d 921 (D.C. Cir. 1958). (1) The likelihood that plaintiffs in these cases will prevail on their claim that Section 501(c)(3) does not permit the defendants to grant tax-exempt status to racially discriminatory private schools is very great indeed; *see Green* v. *Connally, supra.* (2) Plaintiffs-appellant's rights will be irreparably infringed if, before the issue can be litigated to conclusion, defendants take action contrary to the declaratory judgment in *Green* to restore or grant tax exemptions to racially discriminatory private schools, *see Green* v. *Kennedy*, 309 F. Supp. 1127, 1138-39 (D.D.C.), *appeal dismissed sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970) (granting preliminary injunction). (3) Other parties will not be harmed by the issuance of injunctive relief to compel the government's adherence to a policy which has been followed for the past twelve years at least until there is a final adjudication whether continuation of that policy is required by the Internal Revenue Code and the Constitution of the United States. (4) The public interest—a strong national policy against governmental assistance to racial discrimination, *see Green* v. *Connally, supra*, 330 F. Supp. at 1163-65—heavily favors issuance of injunctive relief.

16. For these reasons, plaintiffs-appellants in these cases respectfully submit that they are entitled to injunctive relief from this Court which will prevent the defendants from acting on a construction of Section 501(c)(3) other than that announced in the *Green* declaratory judgment. That relief

is, in plaintiffs-appellants' view, appropriate in either the *Green* or the *Wright* case.

The Basis for Relief in Green

17. In the *Green* case, plaintiffs-appellants have sought effective relief from the district court, which was denied on the basis that the *Green* case extended only to Mississippi (and, by implication, on the basis of a rejection of our claim that plaintiffs' rights even in Mississippi will be infringed by restoration of exemptions to discriminatory schools elsewhere in the country). *See generally*, Transcript of Proceedings, reprinted in Appendix submitted herewith at 63a-88a.

18. On February 5, 1982, plaintiffs in the *Green* litigation filed a Notice of Appeal from the February 4 Order of the district court denying their request for further injunctive relief, and tendered the appropriate docketing fee to the district court clerk. (*See* Appendix at 90a.) This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).

19. This Court is also empowered by F.R. Civ. P. 62(g) to grant an injunction pending its determination of the appeal. Such an injunction would preserve the integrity of the *Green* declaratory judgment *pendente lite* while this Court considered the correctness of the district court's limited view of its own authority to protect plaintiffs' rights under that judgment.

20. Plaintiffs-appellants have not separately sought the relief requested by way of injunction pending appeal from the district court. *See* F.R.A.P. 8. The district court's ruling on the underlying motion to the effect that it may act only with respect to schools located in Mississippi, as well as its comments during the oral argument thereon, make quite clear the futility of any such effort in the district court.

21. The relief sought from this Court *pendente lite* is narrower than that requested of the district court in the January 13 motion (*see* Appendix accompanying this Motion at 28a-29a) and is specifically designed to preserve the *status*

quo ante during the pendency of this appeal, which plaintiffs would respectfully request be expedited.

The Basis for Relief in Wright

22. Plaintiffs-appellants are also entitled to this relief in the *Wright* case in order to preserve effectively their right to litigate on remand the claims which this Court has held they have standing to pursue.

23. Having stayed issuance of its mandate pending disposition of the Petitions for Writs of Certiorari filed in *Wright*, this Court retains jurisdiction of the underlying controversy. The "All Writs Act," 28 U.S.C. § 1651(a), authorizes this Court to grant the relief requested in order to preserve the potential effectiveness of its mandate. *Federal Trade Comm'n* v. *Dean Foods Co.*, 384 U.S. 597, 603-05 (1966); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, *supra*, 379 U.S. at 425-26.

24. The relief sought in this motion by plaintiffs-appellants is much narrower than that sought, pending the initial disposition of the appeal in *Wright*, in their motion of June 18, 1980. As described above, the relief sought herein concerns not the procedural injunctive remedies requested in the underlying litigation (delineating the methods and standards to be employed by the Service in order to determine whether a school in fact follows a "racially nondiscriminatory policy as to students"), but rather concerns the basic substantive law upon which the *Wright* action, and this Court's decision therein, are founded.

25. The relief sought by the plaintiffs-appellants in *Wright* would likewise operate *pendente lite*, and would remain in effect (unless otherwise vacated by this Court or the Supreme Court) unless and until either (a) the Supreme Court were to reverse this Court's underlying ruling and to declare that plaintiffs-appellants in *Wright* may not maintain the lawsuit; or (b) following appropriate Supreme Court action, the district court afforded plaintiffs the opportunity to litigate their claims in *Wright* contemplated by this Court's mandate.

Need for Expedited Relief

26. Because defendants are presently under no restraint with respect to the grant or restoration of tax-exempt status to racially discriminatory schools outside Mississippi, and have announced publicly their intention to restore exemptions to two such schools (Bob Jones University and Goldsboro Christian Schools, Inc.), plaintiffs seek emergency relief from this Court. This motion is filed as early as practicable (one day after completion of the transcript of proceedings). Plaintiffs-appellants are unable to advise the Court when the defendants intend to complete the process of restoring exemptions to Bob Jones University and Goldsboro Christian Schools, Inc.—or when defendants might decide to grant or restore additional exemptions to racially discriminatory private schools outside Mississippi. For this reason, plaintiffs-appellants must seek relief prior to the expiration of the seven-day period following the filing of this motion (*see* Rule 6(j) of this Court). Plaintiffs-appellants have asked counsel for the defendants to advise the Court if the government will agree to take no action to grant or restore such exemptions pending action by the Court on this motion. Counsel for plaintiffs-appellants have notified all counsel who could be reached by telephone of these matters, as recited in the accompanying affidavit which is being lodged with the Clerk of this Court, and the motion is being served by hand on the date of its filing upon all local counsel.

CONCLUSION

Injunctive relief *pendente lite* is necessary to prevent defendants from illegally and irrationally granting tax benefits to at least two racially discriminatory private schools despite the facts that: (1) the declaratory judgment obtained by plaintiffs-appellants against defendants in *Green* v. *Connally*, *supra*, declares that §501(c)(3) of the Internal Revenue Code precludes such grants; and (2) defendants themselves recognize that such grants would be contrary to both long-standing government policy and also to the policy the government claims it intends to follow in the future. Particularly in this visible case, where both justice and the

appearance of justice ought to be done, the Court should restrain the irrational, illegal and inequitable conduct of the defendants.*

WHEREFORE, for the foregoing reasons, plaintiffs-appellants respectfully pray that this Court enter its Order enjoining the defendants-appellees Secretary of the Treasury and Commissioner of Internal Revenue from granting or restoring federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school which does not have a 'racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment issued by the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. at 1179.

Respectfully submitted,

---

*While the relief sought by plaintiffs-appellants from this Court would, in our view, prevent the government from mooting the *Bob Jones* and *Goldsboro* cases in the Supreme Court through illegal action, it would neither finally determine the rights of those institutions nor deny them any procedural rights, since the schools have already placed in issue in their Supreme Court briefs the correctness of the 1971 *Green* declaratory judgment. Hence, a decision on the merits by the Supreme Court in *Bob Jones* and *Goldsboro* will also confirm or remove the basis for continuation of the injunctive relief we now seek.

The effect upon the pending *Bob Jones* and *Goldsboro* cases in the Supreme Court is merely incidental to the relief which we believe plaintiffs-appellants are unquestionably entitled to in order to protect *their* rights. The unusual interrelationship between these cases and the *Bob Jones* and *Goldsboro* matters results not from the actions of plaintiffs-appellants, but from the fact that the government has unilaterally sought to moot those matters by taking steps which contravene the declaratory judgment in *Green*. Moreover, if dissatisfied, the government can ask the Supreme Court to vacate any *pendente lite* injunction granted by this Court.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

No. 80-1124

CIVIL ACTION No. 76-1426

INEZ WRIGHT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT, AND EPHRON ANTONI WRIGHT, JR., ET AL., APPELLANTS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

No. 82-1134

Civil Action No. 69-01355

WILLIAM H. GREEN, ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR CHILDREN, ET AL., APPELLANTS

v.

DONALD T. REGAN, AS SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL.

FILED FEB. 18, 1982

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

ORDER

On consideration of movants' request for an injunction pending appeal in No. 82-1134, for an injunction under the "All Writs Act" to preserve the status quo and protect the potential effectiveness of this court's decision in No. 80-1124, and for consolidation of Nos. 82-1134 and 80-1124, it is hereby

ORDERED that the application to consolidate Nos. 82-1134 and 80-1124 is denied; and it is further

ORDERED that the motion for an injunction pending appeal in No. 82-1134 be referred forthwith to the motions panel for expeditious consideration; and it is further

ORDERED that the motion for relief under the "All Writs Act" in No. 80-1124 be filed and that a response thereto by the Secretary of the Treasury and the Commissioner of Internal Revenue be filed within fifteen days of the date of this order; and it is further

ORDERED, that to preserve the status quo pending response to the motion in No. 80-1124 and, thereafter, the court's determination of its authority to consider and decide the issues presented, *see United States* v. *United Mine Workers*, 330 U.S. 258 (1947), the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, *see Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp., 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971).

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 76-1426
Filed Mar. 24, 1982

No. 80-1124

INEZ WRIGHT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT, AND EPHRON ANTONI WRIGHT, JR., ET AL., APPELLANTS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for injunction under the "All Writs Act," and of the responses and reply thereto, it is

ORDERED that the Order of this Court of February 18, 1982, is continued in force as herein provided. That Order directed the Secretary of the Treasury and Commissioner of Internal Revenue "not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. §501(c)(3) to any school that unlawfully discriminates on the basis of race, *see Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a 'racially nondiscriminatory policy as to students,' as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971)." If appellants Wright, *et al.*, do not notify this Court within 20 days from the date of this Order that they have filed in the District Court a motion for injunction requesting relief similar to the relief granted by this Court's February 18, 1982, Order, then this Court's Order of February 18, 1982, shall be vacated 20 days from the date of this Order. If appellants do so notify this Court, then this Court's Order of February 18, 1982, shall remain in effect until the District

Court rules on the motion for injunction and pending any appeal to this Court from that ruling. *See* Fed. R.App. P. 8(a).

Per Curiam

Circuit Judge Tamm dissents from the foregoing order.

Supreme Court of the United States

No. 81-757

W. WAYNE ALLEN, PETITIONER,

v.

INEZ WRIGHT, ETC., ET AL.

ORDER ALLOWING CERTIORARI. Filed June 20, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. This case is consolidated with case No. 81-970, *Donald T. Regan, Secretary of the Treasury, et al.* v. *Inez Wright, et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 81-970

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS,

v.

INEZ WRIGHT, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 20, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. This case is consolidated with case No. 81-757, *W. Wayne Allen* v. *Inez Wright, etc., et al.*, and a total of one hour is allotted for oral argument.

Opposition

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-757 and 81-970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

W. WAYNE ALLEN,

Petitioner,

v.

INEZ WRIGHT, *et al.*

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al,*

Petitioners,

v.

INEZ WRIGHT, *et al.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether black schoolchildren attending public schools in desegregating districts have standing to challenge the grant of federal tax exemptions to segregated private schools created or expanded in the wake of public school desegregation?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-757

W. WAYNE ALLEN,

Petitioner,

v.

INEZ WRIGHT, *et al.*

No. 81-970

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al,*

Petitioners,

v.

INEZ WRIGHT, *et al.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION TO CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondents are parents of black children attending public schools in desegregating school districts in seven states throughout the country. They brought suit, on their own behalf and on behalf of others similarly situated, in

the United States District Court for the District of Columbia seeking to enjoin the federal petitioners (the Secretary of the Treasury and the Commissioner of Internal Revenue) from providing federal support—in the form of exemptions from federal income taxation (pursuant to Section 501 of the Internal Revenue Code of 1954) and the consequent deductibility from individual income of contributions—to racially segregated private schools serving desegregating public school districts.

Respondents' suit is a companion to *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971) in which it was held that the Internal Revenue Code does not permit the grant of tax exemptions to private schools which discriminate on the basis of race. The court in *Green* recognized that, because of "the constitutional inhibitions" on government aid to racial discrimination, any other construction of the Code would present "serious constitutional claims." 330 F. Supp. at 1165.

After the issuance of a preliminary injunction in *Green*, 309 F. Supp. 1127 (D.D.C. 1970), the IRS announced the abandonment of its prior practice of according tax-exempt status to racially discriminatory private schools and adopted the position that such schools are not entitled to tax exemption.[1] Respondents allege in the instant action that, notwithstanding *Green* and the IRS change of position, the IRS in fact permits schools that do discriminate on the basis of race to receive tax exemptions simply by adopting—but not implementing—a "policy" of non-discrimination. Subsequent to the filing of the instant action by respondents, the Commissioner of Internal Revenue conceded that its procedures are ineffective. Commissioner Jerome Kurtz has testified that:

> We concluded that the Service's procedures were ineffective in identifying schools which in actual opera-

[1] IRS News Release (July 10, 1970), 7 STAND. FED. TAX REP. (CCH) ¶ 6790, codified in Rev. Proc. 71-447, 1971-2 C.B. 230.

tion discriminate against minority students, even though the schools may profess an open enrollment policy and comply with the yearly publication requirement of Revenue Procedure 75-50 . . . . A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. This position is indefensible.[2]

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[2] *Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (statement of Jerome Kurtz). Commissioner Kurtz was referring to Mississippi private schools held ineligible for state textbook assistance under the standards applied in Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974), *on remand from* 413 U.S. 455 (1973). *See also* Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975).

The three-judge court in Green v. Connally, *supra*, had described all-white Mississippi private schools founded about the time of public school desegregation in that State as "carrying a badge of doubt." 330 F. Supp. at 1173. The district court in *Norwood* had ruled that coincidence between an all-white school's formation or expansion and the time of public school desegregation established a presumption that the school followed a racially discriminatory policy (whether or not reduced to writing)—a presumption which the school had the burden of rebutting by objective evidence if it wished to participate in the textbook program. 382 F. Supp. at 924-26. Nevertheless, the Service refused to adopt these principles when it reconsidered its policy in this area in 1975. *See* Rev. Proc. 75-50, 1975-2 C.B. 587.

As a result, schools held discriminatory and ineligible for textbook assistance in *Norwood* continued to enjoy exemption from federal income taxation when this action was filed in 1976. Further proceedings in the *Green* litigation, which was reopened at the same time for the purpose of enforcing the 1971 decree, resulted in the entry of orders in 1980 requiring IRS to apply *Norwood*-type standards to Mississippi schools, Green v. Regan, Civ. No. 1355-69 (May 5 and June 2, 1980), and pursuant to those orders the IRS in 1981 revoked the exempt status of several private schools in Mississippi which earlier had been ruled ineligible for state-furnished textbooks. *See* 1981-37 I.R.B. 102 (Sept. 14, 1981); Report by Defendant of Steps Taken to Implement the Injunctive

As recognized at pages 4-5 of the government's petition, the Revenue Service decided to replace this "indefensible" position with new standards which it announced in a proposed Revenue Procedure published August 22, 1978, but the adoption of any further procedures has since been stalled by congressional enactment of riders to appropriations bills. Except for Mississippi schools, *see* note 2 *supra*, IRS has continued, therefore, to recognize as tax exempt any private school which "profess[es] an open enrollment policy and compl[ies] with the yearly publication requirement of Revenue Procedure 75-50." The relief sought by plaintiffs in this action would require the Revenue Service to implement procedures that are effective to prevent the grant of tax exemptions to schools that admittedly discriminate [3] in violation of their professed, but not implemented, policy of non-discrimination.[4]

Decree of this Court, Green v. Regan, *supra*, filed July 1, 1981, at 2-6.

[3] Petitioners' contentions that respondents do not allege that any of the schools are actually discriminating fail to acknowledge the plain import of the allegation that schools enjoying federal tax exemption are not in fact implementing their professed policy of non-discrimination (Complaint, ¶ 2). The complaint also alleges that "[m]any of the private schools described in the foregoing paragraphs have been found to discriminate on the basis of race . . ." (Complaint, ¶ 22).

[4] The relief sought by the plaintiffs is similar to that described by the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in Adams v. Richardson, 480 F.2d 1159, 1163-64 (1973) (*per curiam*):

> The injunction does not direct the termination of any funds, nor can any funds be terminated prior to a determination of noncompliance. In this suit against the agency, in contrast to actions brought against individual school systems, our purpose, and the purpose of the District Court order as we understand it, is not to resolve particular questions of compliance

Prior to the commencement of discovery, the District Court granted a motion to dismiss the complaint, primarily on grounds of lack of standing. The Court of Appeals reversed, holding that plaintiffs do have standing, and that neither the doctrine of "non-reviewability" nor the congressional appropriations riders, on which the District Court had also relied, provide a basis for dismissing the complaint.

SUMMARY OF ARGUMENT

The holding below sustaining respondents' standing to sue is based on settled precedent of this Court in cases challenging state aid to racially segregated schools. Since respondents' injury flows directly from the provision of federal tax benefits to such schools, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) is distinguishable. Denial of standing to respondents to enjoin tax exemptions to private schools would render the equal protection component of the Fifth Amendment a nullity.

The other questions raised by petitioners should not be addressed at this stage of the proceedings.

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or noncompliance.[5] It is, rather, to assure that the agency properly construes its statutory obligations, and that the polices it adopts and implements are consistent with those duties and not a negation of them.[6]

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[5] Far from dictating the final result with regard to any of these districts, the order merely requires initiation of a process which, excepting contemptuous conduct, will then pass beyond the District Court's continuing control and supervision. The school districts must be notified of the purpose to terminate and be given a hearing. 45 C.F.R. § 80.8(c) . . . .

[6] This action is consistent with the nature of judicial review exercised in other situations. [citations omitted.]

REASONS FOR DENYING THE WRIT

I.

The holding of the Court of Appeals that respondents have standing to sue reflects the correct application of settled principle. There is no need for further elaboration by this Court.

A.

The starting point for standing analysis is injury. *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972). Respondents are parents of black school children who complain of, and seek to enjoin, government aid to private schools in their communities which are alleged to be racially discriminatory and to interfere with desegregation of local public school systems.[5] It is bedrock constitutional law that government aid to racially segregated schools "through any arrangement, management, funds, or property" deprives black children and their parents of the equal protection of the laws and is forbidden. *Cooper* v. *Aaron*, 358 U.S. 1, 4 (1958), construing *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). *See Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Brown v. South Carolina State Bd. of Educ.*, 393 U.S. 222 (1968), *aff'g per curiam* 296 F. Supp. 199 (D.S.C. 1968); *Poindexter* v. *Louisiana Fin. Assistance Comm'n*, 389 U.S. 571 (1968), *aff'g per curiam* 275 F. Supp. 833 (E.D. La. 1967); *Wallace* v. *United States*, 389 U.S. 215 (1967), *aff'g Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967); *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 368 U.S. 515 (1962), *aff'g* 197 F. Supp. 649 (E.D. La. 1961); *Bush* v. *Orleans Parish School Bd.*, 365 U.S. 569 (1961), *aff'g* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1961); *Faubus* v. *Aaron*, 361 U.S. 197 (1959), *aff'g Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957).[6] That is

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[5] Complaint, ¶ 4.

[6] *See also* United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974) (*en banc*); Wright v. City of Brighton, 441 F.2d 447 (5th

why, in circumstances analogous to the instant case, the parents of the black schoolchildren in *Norwood* v. *Harrison*, *supra*, had standing to challenge the state's practice of lending textbooks to students in private schools that practiced racial discrimination. There, as here, members of the group subjected to the discrimination had standing to sue to enforce the government's "constitutional obligation . . . to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." 413 U.S. at 467. *Accord*, *Gilmore* v. *City of Montgomery*, *supra*.[7] There is nothing new or expansive about the decision of the Court of Appeals that plaintiffs have standing, similar to that of the plaintiffs in the companion case of *Green* v. *Connally*, *supra* to challenge government aid to private discrimination that injures them.[8]

Cir.), *cert. denied*, 404 U.S. 915 (1971); Driver v. Tunica County School Dist., 440 F.2d 377 (5th Cir. 1971), *aff'g* 323 F. Supp. 1019 (N.D. Miss. 1970); Coffey v. Mississippi State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (three-judge court); Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965).

[7] The opinion below emphasizes the "denigration [plaintiffs] suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth," 656 F.2d 827, Allen Pet. App. 13b; *see also* id. at 829 n.24, Allen Pet. App. 17b n.24, and the fact that "government support . . . stigmatizes black schoolchildren and their parents by signaling official approbation of educational institutions that perpetuate in local communities notions, once prevalent in our nation, of the inferior quality of the black race," 656 F.2d at 836-37, Allen Pet. App. 34b. This analysis echoes the decisions of this Court interpreting the Fourteenth Amendment. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (Fourteenth Amendment affords blacks "the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society . . .).

[8] The standing issue was specifically addressed in *Green* in connection with the Court's ruling on a motion for a preliminary injunction. 309 F.Supp. 1127, 1132 (D.D.C.) (three-judge court), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

B.

Petitioners' contention that the instant case should be governed by *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), overlooks the fact that that case involved a completely different kind of injury from that involved here. The plaintiffs in that case were indigents who complained that they were being denied medical treatment by hospitals that were, nonetheless and contrary to the interpretation of the Internal Revenue Code urged by the plaintiffs, accorded tax-exempt status as charities. This Court held that plaintiffs lacked standing, reasoning that it was "purely speculative" whether the injury complained of (denial of medical service) could be fairly traced to the challenged action of the Revenue Service rather than to "decisions made by the hospitals without regard to the tax implications." 426 U.S. at 41-42. The Court found it "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of [the] services" they sought from the hospitals. *Id.* at 42.

In sharp contrast to *Eastern Kentucky*, the injury complained of here flows directly from the unconstitutional conduct of the Revenue Service and would be immediately redressed by grant of the relief sought. Plaintiffs do not seek, in this lawsuit, either as relief or as a consequence of the relief awarded, admission to private schools which effectively exclude black students. Nor do they seek to compel the United States government to take any actions to change the racially discriminatory policies of any private schools. *Cf. Runyon* v. *McCrary*, 427 U.S. 160 (1976). Rather, their position is that while such schools may continue to exist, they may not receive tangible government support. The federal courts have the power and duty to redress their injury by ordering the Revenue Service to adopt procedures that will be effective to terminate the grant of tax benefits to racially discriminatory schools. Accordingly, this case is not governed by *Eastern Kentucky*, but by *Norwood* v. *Harrison*, *supra*, where this

Court held that the district court erred in thinking that plaintiffs were required to show that termination of the free textbooks would cause students to transfer from private to public schools. Chief Justice Burger, writing for the Court, explained:

> We do not agree with the District Court in its analysis of the legal consequences of [the] uncertainty [whether the relief requested would result in student transfers from private to public schools], for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A state may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.

Like the black parents in *Norwood*, plaintiffs here have standing to seek an end to government aid to private discrimination because such government aid in and of itself injures them. The difference between *Eastern Kentucky* and *Norwood* is not a conflict in legal principle between two decisions of this Court, but simply a factual difference in the kinds of injury alleged in the two cases. The decision of the Court of Appeals in this case simply—and correctly—chose the precedent that fits the facts of this case. There is no need or justification for review.

C.

The contentions advanced by the petitioners, while clothed in Article III "standing" terms, are also fundamentally inconsistent with the equal protection clause of the Fourteenth Amendment.[9] The central purpose of that amendment was to protect black citizens from government-supported racial discrimination. *Civil Rights Cases*, 109 U.S. 3, 10-11 (1883); *Slaughter-House Cases*, 83 U.S. 36,

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[9] This Court has consistently held that the due process clause of the Fifth Amendment embodies the same equal protection principles as does the Fourteenth Amendment. *E.g.*, Davis v. Passman, 442 U.S. 228, 234 (1979), and cases cited.

67-72 (1873).[10] This objective cannot be accomplished if black parents and schoolchildren in desegregating public school districts can secure judicial relief only against the private schools practicing racial discrimination but cannot restrain governmental agencies which are providing essential financial support for these institutions.[11] Such a rule renders the Fourteenth Amendment an empty promise and overrules firmly established precedent.[12]

It is no answer to suggest, as the government does, that respondents should be remitted to the Congress (U.S. Pet. at 20-21). The guarantees of the equal protection clause are personal and immediate; they are not subject to popular vote, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 389 (1969); and equal protection does not mean that black citizens must depend upon state legislatures or Congresses elected by the majority race for vindication of their rights. *See Davis* v. *Passman*, 442 U.S. 228, 239, 241-42 (1979).[13]

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[10] Unlike the constitutional provisions involved in Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) and United States v. Richardson, 418 U.S. 166 (1974), which created "undifferentiated right[s] common to all members of the public" (U.S. Pet. at 15), therefore, the Fourteenth Amendment (and, by extension, the equal protection component of the Fifth Amendment's due process clause) was added to the constitutional text to safeguard an identifiable segment of the citizenry: blacks, the same class to which respondents belong. For somewhat similar reasons, the government's suggested distinction of *Norwood* and *Gilmore* (U.S. Pet. at 17-18) is ineffectual; respondents are all members of the classes on whose behalf local public school desegregation was required by court decree or administrative agency action.

[11] In his application for intervention, petitioner Allen alleged that "[t]he revocation of tax exempt status would greatly injure the ability of Briarcrest [the private school to which Allen sends his children] to raise funds for any capital purposes, including improvements and expansion of educational facilities, and would substantially increase the effective net cost thereof . . . ." Motion to Intervene as a Defendant, ¶ 4.

[12] See cases cited at p. 6 *supra*.

[13] No avenue of review except this action is available to respondents. *See* U.S. Pet. at 19-20.

II.

Review of the two other points advanced by petitioners is both unnecessary and, in any event, premature. First, as to the contention that the award of relief to respondents will deeply enmesh the Judiciary in the administration of the tax laws, the Court of Appeals rightly said that, "should [respondents] succeed on the merits, the remedial problem can be handled without large scale judicial intervention in the administrative process." [14] The relief sought runs against the Revenue Service, does not seek to enjoin the assessment or collection of taxes,[15] and is much simpler to administer than other kinds of relief equity courts are frequently called upon to grant. As the Court of Appeals noted, the current IRS guidelines were adopted from the court's 1971 injunctive order in *Green*.[16]

Second, unless and until specific relief based upon a supporting record has been granted to plaintiffs at a time when the then governing appropriations for the Revenue Service purport to preclude the Service from giving effect to the relief, there is no need or wisdom in grappling with the "[t]urbulent issues under our fundamental instrument of government" that the Court of Appeals rightly foresaw would be presented by such appropriations riders.[17]

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[14] 656 F.2d at 837, Allen Pet. App. 35b. See also note 4 *supra*.

[15] Petitioners' reliance on the Anti-Injunction Act, 26 U.S.C. § 7421(a), is misplaced, as that statute is inapplicable in a case where, as here, the relief requested would increase rather than restrain the assessment and collection of taxes. See Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 5 n.14 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278, 1285-86 (D.C. Cir. 1974), *rev'd on other grounds*, 426 U.S. 26 (1976); McGlotten v. Connally, 338 F.Supp. 448, 453-54 (D.D.C. 1972) (three-judge court).

[16] 656 F.2d at 837 n.56, Allen Pet. App. 35b n.56.

[17] *Id.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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Nos. 81-757 and 81-970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. WAYNE ALLEN,
Petitioner,
v.
INEZ WRIGHT, *et al.*,
Respondents.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Petitioners,
v.
INEZ WRIGHT, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER W. WAYNE ALLEN

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QUESTIONS PRESENTED

1. Do plaintiffs, black parents of public school children, have standing to sue the Secretary of the Treasury and the Commissioner of Internal Revenue for an injunction requiring revision of federal income tax procedures relating to tax-exempt private schools, where plaintiffs allege no actual injury to themselves either by any private school or by the tax procedures?

2. Should a federal court entertain a suit by plaintiffs unaffected by federal income tax procedures, where the only complaint about the procedures is that they permit someone else, unrelated to the plaintiffs, to "slip through the Commissioner's net of enforcement" through "inadequate monitoring"?

PARTIES INVOLVED

PETITIONERS

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ROSCOE L. EGGER, JR., Commissioner of the Internal Revenue Service, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C. 20224.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-757

W. WAYNE ALLEN,

Petitioner,

v.

INEZ WRIGHT, *et al.*,

Respondents.

No. 81-970

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Petitioners,

v.

INEZ WRIGHT, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER W. WAYNE ALLEN

OPINIONS BELOW

Nos. 81-757 and 81-970. The opinion of the district court dated November 26, 1979 (Interv. Pet. App. A 1a-15a),[1] is reported at 480 F. Supp. 790. The order of the

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[1] "Interv. Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari (No. 81-757) filed by Petitioner W. Wayne Allen.

district court (J.A. 64)[2] as amended by the order dated December 18, 1979 (J.A. 65), is not reported. The opinion of the court of appeals dated June 18, 1981 (Interv. Pet. App. B 1b-58b), is reported at 656 F.2d 820.

JURISDICTION

Nos. 81-757 and 81-970. The judgment of the court of appeals (J.A. 67) was entered on June 18, 1981. The orders of the court of appeals denying the petition for rehearing (Interv. Pet. App. C) with suggestions for rehearing en banc (Interv. Pet. App. D) were entered on August 26, 1981. A Petition for a Writ of Certiorari (No. 81-757) was filed on behalf of W. Wayne Allen on October 20, 1981, and was granted on June 20, 1983 (J.A. 85), to be consolidated with No. 81-970. A Petition for a Writ of Certiorari (No. 81-970) was filed on behalf of petitioners Regan, et al. (hereinafter collectively "IRS"), on November 23, 1981, and was granted on June 20, 1983 (J.A. 86), to be consolidated with No. 81-757. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution; Section 501(a) and (c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.); Rev. Stat. 1977 (1878 ed.) (42 U.S.C. § 1981); and Sections 103 and 615 of the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559, 577 are set forth at Interv. Pet. 2-4. The relevant provisions of Article III of the Constitution and Section 170(a) and (c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix A to the Petition for a Writ of Certiorari filed by the IRS.

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[2] "J.A." refers to the Joint Appendix filed in these consolidated cases. (Nos. 81-757 and 81-970).

Revenue Procedure 75-50, 1975-2 Cum. Bull. 587; the Proposed Revenue Procedure; and the Modified Proposed Revenue Procedure are set forth respectively at Interv. Pet. App. E 1e-12e, F 1f-13f, and G 1g-14g.

STATEMENT

Respondents are 25 black parents who have children attending desegregated public schools [3] in seven states extending from Louisiana to Massachusetts.[4] They brought this suit in the United States District Court for the District of Columbia against the petitioners Commissioner of the Internal Revenue Service and Secretary of the Treasury seeking declaratory and injunctive relief requiring the IRS to modify its current procedures [5] for enforcing its "regulations prohibiting the grant of tax-exemptions to [discriminatory] private schools" [6] so as

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[3] J.A. 62.

[4] Respondents sought to represent a class of the "several million" black parents and children similarly situated. (J.A. 22-23). The case was dismissed before the class certification question was addressed.

[5] Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 (Interv. Pet. App. E. 1e-12e), the currently effective revenue procedure issued by the IRS for use in determining whether a private school is nondiscriminatory and, therefore, entitled to tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), was developed as a result of *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971). For a more detailed history of the development of this policy *see Bob Jones University v. United States*, —— U.S. ——, 76 L. Ed. 2d 157 (1983).

[6] J.A. 17. The IRS defines nondiscriminatory to mean:

> that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarships and loan programs, and athletic and other school-administered programs.

Rev. Rul. 71-447, 1971-2 Cum. Bull. 230.

to deprive approximately 3,500 private schools with a total enrollment of over 750,000 children [7] of federal income tax exemption and deductibility status.[8] Respondents identify, but fail to join as parties, 19 private schools which are alleged to be "racially segregated" and which are said to be examples of the "thousands of other racially segregated private schools which operate in or serve desegregating public school districts . . . ." [9]

Respondents do not allege that "they sought admission to these schools, that they were deterred from applying, or even that the schools engage in unlawful discrimination." [10] "[T]hey have no interest whatever in enrolling their children in a private school." [11] However, by way of relief, respondents would require the IRS to revoke the tax-exempt status of any private school which meets the following criteria:

1. The school has "insubstantial or nonexistent minority enrollment . . ." [12] and

2. The private school is located in a public school district which is undergoing desegregation; and

3. Any *one* of the following:

   a. The school was established or expanded at or about the time the public schools in its area were desegregating; *or*

   b. The school has been determined in an adversary judicial or administrative proceeding to be racially segregated; *or*

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[7] J.A. 24.

[8] J.A. 40.

[9] J.A. 38.

[10] Interv. Pet. App. B 53b (emphasis omitted).

[11] *Id.* at 13b.

[12] J.A. 19.

c. The school cannot demonstrate that it does not provide racially segregated educational opportunities for white children avoiding attendance in public schools.[13]

Shortly after the suit was filed, Rev. W. Wayne Allen intervened in this action [14] in order to protect the tax-exempt status of Briarcrest Baptist School System, Inc., in Memphis, Tennessee,[15] one of the "example" schools mentioned in the complaint.[16] Not only do his children attend this school, but he has also frequently made deductible contributions to Briarcrest [17] and was the founder of the school.

Preparation for the opening of Briarcrest began in 1970, two years before the implementation of the first busing plan in Memphis public schools.[18] Because of the extensive preparation necessary to open a school with a planned $6,000,000 building, including a survey to determine the need for an additional private school in Memphis, the school did not begin classroom operations until 1973.[19]

From its inception, Briarcrest not only operated on a nondiscriminatory basis, but actively recruited minority students. As Rev. Allen stated:

> Classes [at Briarcrest] began in 1973. As I said, the school has approximately 3,800 students enrolled

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[13] *Id.*

[14] J.A. 51-52; 54-55.

[15] J.A. 47.

[16] J.A. 26-27.

[17] *Id.*

[18] *Tax-Exempt Status Of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. at 392 (1979) (Statement of W. Wayne Allen) (hereinafter "Tax-Exempt Hearings").

[19] *Id.*

> in grades 1 through 12. The school has always operated on a nondiscriminatory basis.
>
> Briarcrest was not formed to avoid desegregation, but to meet a long felt need for Christian education. At the outset, letters were sent to the leading black Baptist pastors in the Memphis area urging them to encourage their members' children to attend Briarcrest.
>
> The foundation and success of Briarcrest has been noted by national publications such as the New York Times, the Wall Street Journal, U.S. News & World Report, Time magazine, and continued stories have been carried on all three major national television networks, news shows about the success of Briarcrest.
>
> In all of these articles, in every news conference and appearance, it has been stressed that black students are not only welcome but encouraged to attend and enroll. Every possible effort has been made to encourage and enroll black students. The doors of the school have been wide open since day one.
>
> Advertisements have been published in the black media, appeals have been made through the black radio stations, personal visits have been made to black pastors to encourage attendance by black students. I have personally offered to raise funds for tuition for black students.[20]

Recruitment efforts have met with only mixed success. Only 2 black students were enrolled in the regular program and 46 were enrolled in one summer program during the first six years of operation.[21] None of the 46 summer students enrolled for the fall even though "the parents of each of these black students were individually contacted and encouraged to enroll their children" at

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[20] *Id.* at 386-87.

[21] *Id.* at 387.

Briarcrest.[22] Briarcrest currently has three black students enrolled for the fall semester.

Recruitment efforts for black teachers produced similar results. In 1978, Briarcrest recruited in 22 black colleges throughout the United States seeking to hire black teachers. No one even applied.[23] Now, however, Briarcrest has 2 black teachers, one of whom is charged with minority recruitment, and the school has established a $10,000 scholarship fund exclusively for minority students. Again, as explained by Rev. Allen:

> The reason black students have not enrolled is not because they are unwelcome or not encouraged or not recruited. The reason in Memphis is very obvious.
>
> The leaders of the black communities strongly discourage their people from sending their children to a newly formed private school. Mrs. Maxine Smith, executive secretary of the NAACP since 1962, stated to the IRS in its public hearing last December:
>
> > No right thinking black Baptist minister would counsel his parishioners to participate in such racial undertaking when, after two decades of constant struggle, a desegregated public school system is on the horizon.
>
> * * * *
>
> This has been the consistent attitude of the black leadership in Memphis. How are you going to recruit black students when the leadership discourages them from attending[?]
>
> * * * *
>
> Responding to a request for assistance in recruiting black students, one of the leading black pastors in Memphis wrote:
>
> > I have received your letter requesting any suggestions or assistance I could render in your

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[22] *Id.*

[23] *Id.* at 393.

> efforts to recruit black students in the Briarcrest Baptist School System. I can certainly understand your frustration in this very difficult task, but I would hope that you can understand some of the reasons that *recruiting blacks in a private school* at this time *is next to impossible.* First of all, the timing is bad. The extremely controversial issue of busing in the public schools has resulted in the hardened attitude toward private schools as far as the black community is concerned.
>
> Until black leadership will exert its influence and efforts at breaking down rather than encouraging this hardened attitude toward private schools, recruitment of black students will be difficult, if not impossible.[24]

In his motion to intervene in this suit, Rev. Allen pointed out that the revocation of Briarcrest's tax-exempt status would seriously and detrimentally affect his rights.[25] His apprehension that Briarcrest would lose its tax-exempt status was based upon his knowledge of the relief requested by respondents. Despite the fact that "no honest person could possibly say Briarcrest, by any fair test or by the IRS's own [current] definition, discriminates against black students," nevertheless, "because Briarcrest has [few or] no black students and was formed [in 1973], it . . . will be classified as a reviewable school and possibly lose its tax-exemption under the proposed regulations." [26]

In response to Rev. Allen's motion to intervene the IRS undertook an extensive audit to determine whether Briarcrest was nondiscriminatory [27] and, therefore, entitled to maintain its tax-exempt status

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[24] *Id.* at 387-88 (emphasis added).

[25] J.A. 47-50.

[26] Tax-Exempt Hearings at 388.

[27] *See* Rev. Proc. 75-50, Interv. Pet. App. E.

> [T]wo agents [came] and spen[t] a full week [at Briarcrest] reviewing admission policies. They looked into every area of the school, they went into the community and interviewed minority leadership. They went to the papers and checked out everything we have done.
>
> We came out of the review that they could find we have no discriminatory practices and it was a very thorough review." [28]

Briarcrest retained its tax-exempt status.

Respondents do not allege that Briarcrest, or any of the other target private schools, has discriminated against their children, or any other child.[29] In fact, "[t]hey maintain they have no interest whatever in enrolling their children in a private school." [30] Rather, respondents allege that by its failure to adopt procedures sufficiently stringent to deny tax-exempt status to schools like Briarcrest,[31] the IRS has injured respondents in two ways. First, they allege that the failure to revoke these exemptions constitutes "tangible financial aid and other assistance to racially segregated education." [32] Second, the respondents allege that the failure to revoke the tax-exempt status of the 3,500 private schools "fosters and

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[28] Tax-Exempt Hearings at 390.

[29] *E.g.*, Interv. Pet. App. A 49.

[30] *Id.* at B 13b.

[31] Rev. Proc. 75-50 requires Briarcrest, and any other school which desires tax-exempt status, to certify under penalty of perjury that the school advertises and maintains a racially nondiscriminatory policy. (Interv. Pet. App. E 7e-8e). The procedure also specifically solicits information from anyone to the effect that any exempt private school "is not operating under a racially nondiscriminatory policy as to students, including judicial or administrative determinations to this effect." (*Id.* at 9e). A summary of the other requirements of this procedure is contained in the district court's opinion. (*Id.* at A 8a-9a n.3).

[32] J.A. 38.

encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts . . . ." [33]

After Rev. Allen intervened, respondents and the IRS entered into settlement negotiations without his knowledge.[34] As a result of these negotiations, the IRS reversed its previous position and transmitted to the district court a copy of new proposed guidelines for private school racial nondiscriminatory determination.[35] These proposed guidelines adopted respondents' proposed presumption of guilt criteria as set forth in their claim for relief.[36]

When the proposed settlement was announced, the IRS received over 150,000 letters of protest.[37] While the IRS was again revising its proposed revenue procedure for tax-exempt private schools,[38] Congress was passing the "Ashbrook and Dornan Amendments" [39] to the General Appropriations Act of 1980, the effect of which was to prohibit the use of any funds for the formulation or carrying out of the proposed IRS procedures.[40]

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[33] J.A. 39.

[34] *See* Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss at 1-2; 127 Cong. Rec. H5393, 5394 (daily ed. July 30, 1981) (Statement of Representative Ashbrook).

[35] J.A. 58-59.

[36] Interv. Pet. App. F 1f-13f.

[37] 128 Cong. Rec. S15424 (daily ed. Dec. 18, 1982).

[38] Interv. Pet. App. G 1g-14g.

[39] Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, §§ 103, 615, 93 Stat. 559, 577 (1979). Although they lapsed for a short period of time (Interv. Pet. App. B 11b n.19), they remained in effect through fiscal year 1982. They were not adopted for the 1983 fiscal year. *See* 128 Cong. Rec. S15423-28 (daily ed. Dec. 18, 1982); 128 Cong. Rec. H8615-24 (daily ed. Nov. 30, 1982).

[40] Interv. Pet. App. A 2a.

Both Rev. Allen [41] and the IRS [42] having filed motions to dismiss, Judge Hart granted the motions and dismissed the case on the grounds that:

a. Respondents lack standing to assert their claims;

b. The action is barred by the doctrine of non-reviewability; and

c. Recent Congressional action suggests that the court should not fashion a remedy for these respondents.[43]

A divided panel of the court of appeals reversed and remanded the cause for further proceedings.[44]

SUMMARY OF ARGUMENT

The district court correctly held that citizens with children who are attending integrated public schools, who have not applied to any private school, do not want to apply to or attend any private school, have not been denied admission to any private school, are unaware if they would be denied admission on a racially discriminatory basis and do not allege that the schools discriminate against anyone else, do not have standing to seek to require a judicially mandated revision of the method by which the IRS determines whether a private school is nondiscriminatory and entitled to tax-exempt status.

A. To gain access to the federal courts a litigant must meet the Article III standing requirements. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In determining whether these respondents meet those requirements, the proper focus is on the respondents, not on the

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[41] J.A. 56-57.

[42] J.A. 45-46.

[43] Interv. Pet. App. A 3a; *see id.* at 1a-15a.

[44] *Id.* at B 1b-58b.

issues they seek to raise. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

B.1. Respondents seek to attack, as violative of their constitutional rights, the method by which the IRS enforces its policy against the grant of tax-exempt status to discriminatory private schools. However, respondents' children attend integrated public schools, have never applied to any private school and acknowledge that no private school has ever discriminated against them. They have not suffered the requisite injury to themselves which is necessary to satisfy Article III. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Respondents cannot, through the use of artful pleading, avoid the essential standing requirement that they, personally, have suffered an actual injury. *See Simon v. Eastern Kentucky Welfare Rights Organization, supra*; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950). They cannot, on one hand, fail to allege that they have been discriminated against by any private school, yet, on the other hand, allege they have been injured by the method employed by the IRS to determine whether a private school is discriminatory.

2. Respondents do not allege that any particular private school turns away students on the basis of race. Therefore, their claim that the failure to revoke the tax-exempt status of "segregated" private schools violates respondents' constitutional rights is nothing more than an unacceptable attempt by a citizen "to require that the Government be administered according to law." *Valley Forge Christian College*, 454 U.S. at 482-83. *Accord, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972).

The court of appeals incorrectly recognized a special right in black citizens to complain of discrimination of which they have not been victims. *See Gilmore v. City*

of Montgomery, 417 U.S. 556 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972). Because all citizens have "an interest in elimination of discrimination" (Interv. Pet. App. B 51b), to uphold the court of appeals ruling would be an invitation to anyone to utilize the federal courts as an "ombudsmen of the general welfare." *Valley Forge Christian College*, 454 U.S. at 487.

C. Current IRS policy prohibits the grant of tax-exemptions to discriminatory private schools. To obtain tax-exempt status, schools are required to certify that they are nondiscriminatory. Respondents cannot fairly trace a school's false certification to any action by the IRS and, accordingly, lack standing to sue. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41-42.

Nor do respondents have standing to complain that the grant of tax exemptions to private schools allows private schools to exist as an alternative to public education. The decision by parents to send their children to private schools is one protected by the Constitution. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972). That election does not give rise to a cognizable injury to respondents which is traceable to the manner by which the IRS is enforcing its revenue procedures.

D. Finally, it is speculative that the remedy sought by respondents will relieve the harm they allege. There is no showing that, following the imposition of the presumption of guilt criteria sought by respondents, the criteria used by the IRS would be different from those now employed. In addition, if schools presently submit fraudulent certifications to obtain tax-exemptions, there is nothing in respondents' remedy which would preclude the schools from continuing to do so. Moreover, the presumptive nature of the remedy sought with its implicit quota requirement is unlawful. *See Norwood v. Harrison*, 413 U.S. 455 (1973); *Speiser v. Randall*, 357 U.S. 513 (1958); *see also Regents of the University of California*

v. Bakke, 438 U.S. 265 (1978). Given the obvious speculation necessary to conclude that the remedy sought will result in any fewer tax-exemptions to private schools, or the existence of any fewer schools, respondents lack standing. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

ARGUMENT

BLACK STUDENTS ATTENDING PUBLIC SCHOOLS WHO NEITHER DESIRE ADMISSION TO PRIVATE SCHOOLS NOR ALLEGE THAT THEY HAVE BEEN DISCRIMINATED AGAINST BY ANY PRIVATE SCHOOL DO NOT HAVE STANDING TO SUE THE IRS CHALLENGING THE TAX-EXEMPT STATUS OF NONPARTY PRIVATE SCHOOLS

A. Proper Focus On Respondents Rather Than The Issues They Seek To Have Adjudicated Demonstrates That Respondents Lack Standing.

This case presents important constitutional questions concerning a citizen's [45] right, without alleging any concrete injury to himself or others, to have access to the courts to require judicially that the executive branch operate in a manner which comports with the litigant's view of the Constitution. Resolution of these issues in respondents' favor would require abandonment of the constitutional requirement that all litigants must have suffered actual injury, thereby opening the courts as

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[45] Respondents do not seek to rely on their taxpayer status to support standing. (Brief for Appellants at 34 n.37, *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981)). In any event, respondents could not meet the requisites of standing as taxpayers because they do not challenge as unconstitutional an exercise of "congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 478-79 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)); *see United States v. Richardson*, 418 U.S. 166 (1974).

forums for any citizen to air his generalized grievances about the manner in which the government is being run and would, for the first time "outside the First Amendment area," grant standing to a person to litigate the federal tax liability of another. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring). The Court would be overruling, at least *sub silentio*, *Eastern Kentucky* and *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

Respondents seek standing solely as black citizens whose children are attending integrated public schools (J.A. 18-19; 62) to challenge the constitutionality of the enforcement procedures by which the IRS determines the tax-exempt status of private schools, *i.e.*, Rev. Proc. 75-50. Respondents challenge only the *method* of enforcement as "inadequate" and "legally insufficient" (J.A. 25), for they acknowledge that the IRS has "issued regulations *prohibiting* the grant of tax-exemption to [discriminatory] private schools" (J.A. 17) (emphasis added).[46]

Respondents characterize 19 nonparty private schools as "racially segregated" (not racially discriminatory)[47]

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[46] In fact, the IRS has revoked the tax-exempt status of about 106 private schools. (Tax-Exempt Hearings at 252) (statement of Jerome Kurtz, former Commissioner of Internal Revenue); *see, e.g.*, *Bob Jones University v. United States*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, —— U.S. ——, 76 L. Ed. 2d 157 (1983); *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, No. 80-1473 (4th Cir. Feb. 24, 1981), *aff'd sub nom. Bob Jones v. United States*, —— U.S. ——, 76 L. Ed. 2d 157 (1983); *Prince Edward School Foundation v. Commissioner*, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam by unpublished order*, No. 79-1622 (D.C. Cir. June 30, 1980) *cert. denied*, 450 U.S. 944 (1981).

[47] "Racially segregated," as used by respondents in this case, is purely a term of art by which respondents mean that the "target" schools have "insubstantial or nonexistent minority enrollments." (*See, e.g.*, J.A. 18 & 19). Respondents do not allege that any school is racially discriminatory. (*See* Interv. Pet. App. E 2e).

"examples" of the "thousands of other racially segregated private schools which operate in or serve desegregating public school districts . . . ." (J.A. 38). Respondents do not allege, however, that any of their children, or any other child, has ever been discriminated against by any of these schools. (Interv. Pet. App. A 5a-6a; B 46b-47b n.5, 49b and 53b). Respondents have failed to allege that any of their children has ever applied for admission to any of the target private schools. (*Id.* at B 53b). Instead, "[t]hey maintain they have no interest whatever in enrolling their children in a private school." (*Id.* at 13b). Respondents cannot even contend that the tax-exempt status of any private school has affected the public educational opportunities of their children, because "they do go to desegregated schools . . . ." (J.A. 62).

Respondents acknowledge the existence of an IRS regulation which prohibits the award of tax-exempt status to discriminatory private schools (J.A. 17) and which solicits citizens' reports regarding discriminatory private schools. Nevertheless, respondents do not allege that they, or anyone else, have ever advised the IRS "that any exempt private school is not operating under a racially nondiscriminatory policy" as provided for in Rev. Proc. 75-50, Sec. 6 (Interv. Pet. App. E 9e), or that if so advised the IRS would fail to take appropriate action.

Respondents allege that the failure of the IRS to revoke or deny tax exemption to the 3,500 target private schools constitutes "tangible financial aid and other assistance to racially segregated education" (J.A. 18, 38), and "fosters and encourages the organization, operation and expansion of institutions providing . . . educational opportunities for white children avoiding attendance in desegregating public school districts . . . ." (J.A. 18, 39).[48] Such "support," respondents allege, constitutes an

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[48] Petitioner has omitted the term "racially segregated" from this phrase, in that, since respondents do not allege that the private

invasion of their constitutional "right to be free from government aid to segregation." (Interv. Pet. App. A 5a; *see id.* B 13b).

To remedy this "injury" respondents seek "sweeping relief" (*Id.* at A 4a): a judicial revision of the IRS's method of enforcement of its policy against the award of tax-exempt status to discriminatory private schools which would require revocation of tax-exempt status solely because, (1) the school has failed to attract its "quota" of minority students, (2) is located in a city where the public schools are undergoing desegregation, and (3) was formed or expanded during the time of public school desegregation (J.A. 40).

Respondents perceive the *issues* they seek to raise as constitutional. The *remedies* they seek are draconian.[49] As we shall demonstrate, however, proper focus on the respondents, and not the issues they seek to have adjudicated, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 38 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)), leads inescapably to the conclusion that respondents cannot meet the "threshold requirement" of Article III of the Constitution, *see, e.g., City of Los Angeles v. Lyons*, —— U.S. ——, 75 L. Ed. 2d 675, 684 (1983), that in order to gain access to the

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schools are in fact discriminating on the basis of race, that the schools are alleged to be all or predominantly white is of no legal significance.

[49] Under respondents' proposed criteria, Briarcrest would clearly have its tax-exempt status placed in jeopardy because its extensive recruitment efforts have met with limited success—having run head-on into a "mind set" in the black community against black parents sending their children to private schools. Thus, Briarcrest would have been wrongly condemned, despite the admonition in *Green v. Connally*, 330 F. Supp. 1150, 1166-67 (D.D.C.), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971), that schools need not "fear lest their schools will undertake only activities that are innocent, *i.e.*, not racially discriminatory, yet be wrongly condemned as discriminatory."

courts of the United States a litigant must meet the constitutional[50] and, ordinarily, the prudential requirements of standing, *Valley Forge Christian College*, 454 U.S. at 471, 475-76.

Rhetorically phrased, do citizens with children who are attending integrated public schools, who have not applied to any private school, do not want to apply to or attend any private school, have not been denied admission to any private school, are unaware if they would be denied admission on a racially discriminatory basis and do not allege that the schools discriminate against anyone else, have standing to seek to require a judicially mandated revision of the method by which the IRS determines whether a private school is nondiscriminatory and entitled to tax-exempt status?

B. Respondents Lack Standing Because They Fail To Allege That They Have Suffered A Cognizable Injury In Fact And Are Seeking Only To Air Generalized Grievances.

1. Respondents' claim for standing is based upon the alleged violation of their Fifth and Fourteenth Amendment constitutional rights as a result of the manner in which the IRS enforces its policy against granting tax-exempt status to discriminatory private schools. But respondents do not have standing to assert their claim be-

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[50] Succinctly stated, the constitutional requirements are that:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 US 91, 99; 60 L Ed 2d 66, 99 S Ct. 1601 (1979) and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 US 26, 38, 41, 48 L Ed 2d 450, 96 S Ct 1917 (1976).

Valley Forge Christian College, 454 U.S. at 472 (footnote omitted).

cause they do not allege that they have been victims of discrimination by private schools.

As this Court has stated: "it is not enough that the conduct which the plaintiff complains will injure *someone*. The complaining party must also show he is . . . concretely affected." *Blum v. Yaretsky*, —— U.S. ——, 73 L. Ed. 2d 534, 543 (1982) (emphasis in original); *see, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) ("that he personally has suffered some actual . . . injury"); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury . . . .'"); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) ("[T]he party seeking review [must] be himself among the injured."). Accordingly, Article III restricts the exercise of judicial power only to those litigants who can show "injury in fact." *Valley Forge Christian College*, 454 U.S. at 473; *Warth v. Seldin*, 422 U.S. at 499.

Because respondents acknowledge that no private school has ever discriminated against them,[51] they assert no "injury in fact." As the trial court aptly noted, this places respondents in a dilemma. If they alleged that any of them had been denied admission by a private school on the basis of racial discrimination, an adequate, direct remedy would be available under *Runyon v. McCrary*, 427 U.S. 160 (1976).[52] Because respondents do not allege

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[51] Respondents, therefore, are on even shakier ground than the plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization*, who sought to revoke the tax-exempt status of hospitals alleging that the hospitals refused to treat them. *See* 426 U.S. at 32-33, 40-41.

[52] The availability under *Runyon* of a direct action against any school which has unlawfully denied anyone admission on the basis of race provides an independent basis for denying respondents the equitable relief they seek. This Court often has denied relief because of the "basic doctrine of equity jurisprudence that courts of

that any school has discriminated against them "they have failed to assert a distinct, papable, and concrete injury and thus lack the requisite standing to assert their claims." (Interv. Pet. App. A 6a).

Through the use of artful pleading, respondents seek to avoid the requirement that they have suffered an actual, concrete injury. Respondents freely admit that they attend integrated public schools (J.A. 62), have never applied for admission to any private school, do not know whether any private school would deny them admission on the basis of racial discrimination (J.A. 62-63), have no desire to attend any private school (Interv. Pet. B 13b) and do not allege that any of the 3500 "target schools" is "actually discriminating in violation of the Constitution or federal law" (*Id.* at A 5a-6a). Such allegations, say the respondents, are superfluous to their claims of injury.

Respondents allege that the procedures by which the IRS enforces its policy of granting tax-exempt status only to nondiscriminatory schools are insufficiently stringent to exclude "private schools with insubstantial or nonexistent minority enrollments which operate in or serve desegregating public school districts" (J.A. 18) and, accordingly, respondents are injured in two respects: (1) exemptions to such schools "constitute tangible financial aid and other assistance to racially segregated education"; and (2) "the exemptions foster and encourage the development of institutions offering racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts . . . ." (*Id.*).

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equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)); *see City of Los Angeles v. Lyons*, —— U.S. ——, 75 L. Ed. 2d at 690.

A similar attempt to vault form over substance was rejected by this Court in a case strikingly similar to this one. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). In *Eastern Kentucky*, this Court denied standing to the plaintiffs who sought to require the IRS to revoke the tax-exempt status to hospitals which had denied them treatment, because it was "speculative" whether the injury to plaintiffs could be traced to the "encouragement" offered by the IRS and was "equally speculative" whether the remedy sought would provide the desired relief. 426 U.S. at 42-43.

In so holding, the majority rejected the dissenting members' characterization of the injury which is startlingly similar to that proffered by the respondents in this case. Justice Brennan, joined by Justice Marshall, dissenting as to standing, stated:

> They claim the IRS is offering the economic inducement of tax-exempt status to such hospitals under terms illegal under the Internal Revenue Code. Respondents' claim is not, and by its very nature could not be, that they have been and will be illegally denied the provision of indigent medical services by the hospitals. Rather, if respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest—as respondents alleged, injury to their "opportunity and ability" to receive medical services.

426 U.S. at 55-56 (concurring and dissented). The Court rejected artful pleading as a substitute for injury in fact in *Eastern Kentucky*, where respondents had been denied service by the target hospitals. This Court should not do otherwise here where respondents not only do not allege that any of the target schools has discriminated

against them, but also disavow any interest in attending such a school.[53]

2. Further examination of respondents' claim reveals additional infirmities. Absent an allegation of injury in fact, the allegation that the challenged actions of the IRS violate respondents' Fifth and Fourteenth Amendment Constitutional rights provides respondents no basis for standing. The majority in the court of appeals would create a unique "right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination." (Interv. Pet. App. B 24b-25b). Although acknowledging that the respondents "do not allege that any particular school turns away students on the basis of race" (*Id.* at 22b n.27), the court of appeals nevertheless felt that respondents had standing to attempt to address their generalized grievance:

> the denigration they suffer as black parents and school children when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth.

(*Id.* at 13b). There is no precedent for such a ruling.

Indeed, this Court has recently reaffirmed the principle that a federal court is not the proper forum for a citizen to assert " 'the right possessed by every citizen, to require that the Government be administered according to law . . . .' "[54] *Valley Forge Christian College*, 454 U.S.

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[53] *See also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (Frankfurter, J., rejecting "artful pleading" in the context of a declaratory judgment action); *cf. Warth v. Seldin*, 422 U.S. at 509 (" 'Of course pleadings must be something more than ingenious academic exercise in the conceivable.' ") (quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)).

[54] Respondents have acknowledged, as they must, that "*all* citizens have an interest in the elimination of discrimination." (Interv. Pet. App. B 51b) (emphasis in original).

at 482-83 (citations omitted). Such claims amount to little more than an attempt by the litigant "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government . . . ." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).[55]

Nor can respondents claim that the constitutional provisions they seek to guard are so fundamental as to require an exception to this Article III limitation. In refusing to accept such a premise with regard to rights under the Establishment Clause, the Court held that there is "no principled basis on which to create a hierarchy of constitutional values or a complimentary 'sliding scale' of standing . . . ." *Valley Forge Christian College*, 454 U.S. at 484. Accordingly, the Court has denied standing to citizens seeking to require the government to comport with the Ineligibility and Incompatibility Clauses (Art. I, § 6, cl. 2) in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) and *Ex parte Levitt*, 302 U.S. 633 (1937), with the Accounts Clause (Art. I, § 9, cl. 7) in *United States v. Richardson*, 418 U.S. 166 (1974), and, again, with the First Amendment in *Laird v. Tatum*, 408 U.S. 1 (1972).

Schlesinger is particularly instructive. Whereas respondents have brought suit to require that the target private schools be taken off the IRS's list of tax-exempt organizations, plaintiffs in *Schlesinger* brought suit to require that congressmen be taken off the Secretary of Defense's list of reservists. Plaintiffs alleged that allowing congressmen to hold positions in both the executive and representative branches of government violated the Incompatibility Clause. The Court found that the stated

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[55] Similarly, respondents could not, and have never sought to, rest their "claim to relief on the legal rights or interests of 'third parties'." *Valley Forge Christian College*, 454 U.S. at 474 (quoting *Warth v. Seldin*, 422 U.S. at 499). *Accord, H. L. v. Matheson*, 450 U.S. 398, 405-06 (1981); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167-68 (1972).

injury was clearly abstract and one "shared by all citizens." 418 U.S. at 217. Rejecting the sweeping relief sought by plaintiffs as a substitute for concrete injury (418 U.S. at 221-22), the Court denied standing to these citizens. The ruling in *Schlesinger* is equally applicable in the instant case and operates to deny respondents standing.

Despite the opinion by the majority in the court of appeals, the fact that respondents are black citizens complaining of alleged racial discrimination does not require the abandonment of the Article III prerequisite of actual injury. In fact, to do so would be to ignore the explicit directives of this Court in cases involving racial discrimination. For example, in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), an opinion heavily relied upon by the majority to support its unique divergent precedent theory, this Court explicitly held that:

> The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.

Id. at 570-71 n.10. Thus, the plaintiffs in that case had standing to reopen the litigation in which they successfully had required the integration of public parks in order to contest the "exclusive use" of those facilities by racially discriminatory private schools, but were not accorded standing at that juncture to contest the nonexclusive use of the parks by such schools because it was not clear that plaintiffs would suffer a "cognizable injury."[26]

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[26] The other Supreme Court case relied upon by the court of appeals, *Norwood v. Harrison*, 413 U.S. 455 (1973), can provide no comfort to respondents. Although that case contained no discussion of standing, plaintiffs in that case, who were attending public schools in Tunica County, Mississippi, where *all* white children had withdrawn from the public schools to a discriminatory private academy (*see* 413 U.S. at 467 n.9), sought to terminate state supplied textbooks to such discriminatory schools. As this Court commented in the *Gilmore* case:

Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court allowed the black plaintiff standing only "to seek redress for injuries done to him," *i.e.*, refusal to serve him a meal when accompanied by a member. 407 U.S. at 166. The plaintiff was held not to have standing to contest the membership requirements of the Moose Lodge because he "was not injured by Moose Lodge's membership policy since he never sought to become a member." 407 U.S. at 167. Despite the urging of Justice Douglas in dissent (407 U.S. at 183 n.4), this Court declined to recognize a special "spiritual stake" or "chilling effect" resulting in a "cognizable injury" to every black citizen when any other black citizen has been the victim of racial discrimination. *See* 407 U.S. at 168.

Of course, to recognize the right of any citizen to contest discrimination to which he has not been subjected "has no boundaries." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 227. As respondents have conceded, "*all* citizens have an interest in the elimination of discrimination." (Interv. Pet. App. B 51b). To recognize standing in this case, therefore, would be an open invitation to anyone to use the federal courts as a forum for redressing the most generalized of grievances. *See City of Los Angeles v. Lyons*, —— U.S. ——, 75 L. Ed. 2d 675, 690 (1983). For example, there would be no reason why a disinterested third party could not challenge an EEOC approved settlement as insufficient. Or, as Judge Tamm discerned: "female plaintiffs may be

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The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered.

417 U.S. at 570-71 n.10.

The majority also cited *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971) as support for the standing of respondents. In dissent, Judge Tamm incisively demonstrated why the majority was in error. (Interv. Pet. App. B 38b-43b).

heard to complain simply that certain public programs are not being administered efficiently and thereby operate to discriminate against others of their sex." (Interv. Pet. App. B 57b n.13).

These two examples underscore the validity of this Court's refusal to recognize such citizen standing. As the Court stated in *Valley Forge Christian College*:

> Their claim that the government has violated the [Constitution] does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

454 U.S. at 487 (footnote omitted).

In our tripartite system of government, broad matters of general concern to the public are to be addressed by Congress through the political process. Although that method of redressing grievances, necessarily involving hundreds of Representatives and Senators with conflicting interests, is less direct and gives the citizen less assurance of achieving the result he desires, it is still the exclusive forum for general oversight of the government.

> Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian Democracy or a New England town meeting to oversee the conduct of the National Government by lawsuits in the federal courts.

United States v. Richardson, 418 U.S. at 179.

That certainly was not what was intended when the Constitution was drafted and is why the Article III limitations on standing provide a critical check in the balance of power in our system. As this Court stated in *Schlesinger* in denying other plaintiffs standing to "seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatability Clause, an interest shared by all citizens" (418 U.S. at 217):

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

418 U.S. at 222.

Respondents have failed to assert any cognizable injury to themselves and accordingly must be denied access to the federal courts.

C. Respondents' Purported Injuries Are Not Fairly Traceable To The Actions Of The IRS But Result From The Independent Action Of Private Schools Not Before The Court.

In order to meet the constitutional minimum for standing required by Article III, the plaintiff must be able to demonstrate that his injury "fairly can be traced to the challenged action of the defendant, and [is] not injury that results from the independent action of some third party not before the Court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41-42; *see Valley Forge Christian College*, 454 U.S. at 472. Even as characterized by respondents, their injuries cannot fairly be traced to the actions of the IRS, but result from the independent actions of third parties not before the Court.[87]

If any discriminatory private school has received tax-exempt status, it is not the result of IRS action. The stated policy of the IRS is that any school which "does

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[87] To give respondents standing to obtain the judicial revision of IRS procedures affecting nonparty private schools would be outrageously inequitable, since the affected schools would not have access to the courts to test the validity of these procedures prior to losing their tax-exempt status. *See Bob Jones University v. Simon*, 416 U.S. 725 (1974).

not have a racially nondiscriminatory policy as to students does not qualify as an organization exempt from federal income tax." (Rev. Proc. 75-50, Sec. 2.01, Interv. Pet. App. E, 1e).[58] "What the plaintiffs actually challenge here is the *adequacy of agents' enforcement procedures*, arguing that the IRS has failed to weave its net of enforcement fine enough to catch all of the private schools that may discriminate on the basis of race." (Interv. Pet. App. B 50b) (Tamm, J., dissenting) (emphasis in original).[59]

If any discriminatory school is receiving tax-exempt status it is because that school is violating the law, not because of any wrongful action by the IRS. The applicable revenue procedure requires exempt private schools to take a number of affirmative actions in order to maintain their tax-exempt status. They must formally state their nondiscriminatory policy in their charter. They must set forth that policy in all brochures, advertisements and other publications. They must publish that policy effectively within their area of operation. They must maintain a nondiscriminatory policy with respect to faculty, school programs, tuition and scholarships and they must

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[58] Accordingly, the connection between any injury to respondents and the IRS is even more tenuous than was the connection in the *Eastern Kentucky Welfare Rights Organization* case where the challenged Revenue Ruling *allowed* the nonparty hospitals to deny care to the plaintiffs. The Court held, however, that any connection between the denial of care and the challenged Revenue Ruling was "purely speculative." 426 U.S. at 42-43.

[59] It also is likely that this controversy is not ripe for judicial resolution. Respondents make no claim that they have availed themselves of the right under Rev. Proc. 75-50 to complain about any exempt private school which is operating in a racially discriminatory manner. (Rev. Proc. 75-50, Sec. 6, Interv. Pet. App. E 9e), nor do they allege that the IRS would fail to act upon any such complaint. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 49-52 (Brennan and Marshall, JJ., concurring and dissenting); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

certify they are in compliance under penalty of perjury. (*See* Interv. Pet. App. A 8a-9a n.3). Therefore, for a discriminatory school to receive tax-exempt status it has to be "cheating on its taxes"—perjuring itself to certify that it is nondiscriminatory. The criminal acts of third persons cannot be "fairly traced" to the IRS.[40]

There simply is no logical basis to support respondents' assertion that, by failing to catch discriminatory schools that submit criminally fraudulent certifications of nondiscrimination, the government is "providing tangible financial aid and other assistance" to and is "encouraging" such schools. Such an argument seeks to prove too much. It would be just as logical to say that by failing to catch and convict all skyjackers the government is unlawfully encouraging and assisting that activity, thus giving anyone who flies standing to require the government under judicial direction to revise its investigatory procedures. An analogous objective was rejected by this Court in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), in finding that "a private citizen lacks a judically cognizable interest in the prosecution or nonprosecution of another." 410 U.S. at 619; *see Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 37.

The other "injury" which respondents allege—the existence of private schools as a "haven" for white children who would otherwise attend public schools—is the result of actions by the parents of those children. It is the parents who withdraw those children from public school and choose to place them in private schools. In doing so they are exercising a constitutionally protected right. This was expressly recognized in *Green v. Connally*, 330 F. Supp. 1150, 1165-66 (D.D.C.) *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1979), in which the lower court stated:

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[40] It is well settled in tort law that the criminal act of a third party is a superseding cause for which the original actor ordinarily is not held liable. *See* Restatement (Second) of Torts § 448 (1965).

> The liberty of a free people includes the right to educate one's child in a school of the parent's choice in public, private, or parochial. Griswold v. Connecticut, 381 U.S. 479, 482, 495, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965). . . .
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> . . . The vitality and continuing significance of this doctrine is indisputable. Griswold v. Connecticut, supra. As Mr. Justice Brennan said concurring in School District of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 242, 83 S.Ct. 1560, 1583, 10 L.Ed.2d 844 (1963):
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> > Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to chose [sic] the academic environment in which they wish their children to be educated. * * * It is no proper function of the state or local government to influence or restrict that election.

See Wisconsin v. Yoder, 406 U.S. 205 (1972); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

Despite respondents' rhetoric, there is no ground for an *a priori* assumption that parents of private school children are necessarily influenced by racial prejudice in their decisions to send their children to christian, private schools rather than the problem-plagued public schools. *See* P. Skerry, Christian Schools, Racial Quotas, and the IRS 26-28 (1980), *reprinted from* Public Interest (Fall 1980).[61] Of course, the motives of parents in exercising

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[61] At the same time as the public schools were being integrated, they were also required to become strictly secular, as prayer, Bible reading and other religious exercises were banned. *E.g., Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Chamberlin v. Dade County Board of Public Instruction*, 377 U.S. 402 (1964) (per curiam); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). Thus, it is likely that many other parents, like Rev. Allen, as adherents "of the Christian faith," chose to "have [their] children educated at [a private, Christian school], because

Daughtrey v. Carter, 584 F.2d 1050, 1058 (D.C. Cir. 1978). *See also Goldwater v. Carter*, 617 F.2d 697, 709-10 (D.C. Cir. 1979) (en banc) (Wright, C.J., concurring in the result) ("All Americans have a stake in seeing that their leaders act according to the constitutional scheme. The question here is whether these [plaintiffs] have a specific *personal stake* in the outcome of the case.") (emphasis added), *vacated*, 444 U.S. 996 (1979). As counsel for appellants conceded at oral argument, *all* citizens have an interest in the elimination of discrimination. The majority cannot, therefore, justify its grant of standing upon the assertion of an interest, however strongly felt, in the effective administration of the tax laws.

Appellants contend that they have more than a general interest in the effectiveness of IRS procedures. They claim to suffer "distinct and palpable injury when discriminatory private schools receive or retain tax exemptions." Brief for Appellants at 30. The majority opinion attempts to particularize this asserted interest by characterizing plaintiffs' injury as "the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth." Maj. op. at 13. A similar reliance on ethnic affinity, however, was recently held by this court to be insufficient to constitute the personal stake requisite to standing.

In *American Jewish Congress v. Vance*, 575 F.2d 939 (D.C. Cir. 1978), Jewish citizens challenged the federal government's participation in, and implementation of, certain cooperative programs between the United States and Saudi Arabia. Plaintiffs contended that the implementation of "any program or activity involving the Government of Saudi Arabia which directly or indirectly discriminates against American citizens by reason of

their Jewish religion, ancestry, or identity" was unconstitutional. Complaint at 9. The plaintiffs before the court were the American Jewish Congress, a nonprofit association of American Jews, and six individual members of the Congress. Four of the six individuals claimed the right to challenge the government action solely as citizens, taxpayers, and persons "of the Jewish religion, ancestry, and identity." 575 F.2d at 945. One plaintiff alleged that he was deterred from applying for a job with a corporation operating in Saudi Arabia because of Saudi Arabian discrimination; the other individual plaintiff claimed that he was denied a job with another organization solely because of his Jewish religion. This court held that none of these plaintiffs had standing to challenge the United States involvement in this alleged discrimination.[9]

Those plaintiffs who claimed standing on the basis of their status as American Jewish citizens argued that the implementation of cooperative programs between this country and Saudi Arabia "had the purpose and effect of deterring and discouraging American Jews from applying for or otherwise seeking employment and other economic opportunities resulting from the Agreement on Saudi-Arabian-United States Cooperation, although but for their religion, ancestry or identity they are qualified therefor." Complaint at 8. Despite this allegation of substantial governmental involvement in illegal discrimi-

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[9] Judge Robinson dissented only with respect to the standing of the plaintiff allegedly denied employment, finding the remainder of the court's discussion "in accord with the Supreme Court's recent teachings . . . ." 575 F.2d at 949 n.7 (Robinson, J., dissenting). The dissent went on to note, however, that "[p]erhaps the standing of citizens or taxpayers who have suffered a widely-shared injury and who are interested enough to commit their resources to a suit should be recognized when possibly unlawful action would otherwise go unreviewed." *Id.* The court today apparently implements this desire.

nation, this court did not automatically extend to those plaintiffs the right to challenge that involvement. Instead the court proceeded to assess the *injury* purportedly arising from that governmental involvement. A direct comparison of the plaintiffs in the case at hand with these particular plaintiffs reveals the even more attenuated nature of the allegations presented herein. These plaintiffs are black parents and their schoolchildren who challenge governmental involvement in the form of tax exemptions to racially segregated private schools. *Nowhere do the plaintiffs allege that they sought admission to these schools, that they were deterred from applying, or even that the schools engage in unlawful discrimination.* In essence, they allege only that the inadequacy of Service procedures encourages the development of racially segregated schools, thereby undermining their right to public school desegregation. It would appear, therefore, that the plaintiffs here are in no better position than the Jewish citizens above who challenge United States involvement with Saudi Arabian discrimination solely as American citizens of the Jewish religion. "Once again, however, the plaintiffs have fallen short of alleging the type of concrete and direct injury requisite to invocation of federal judicial power. *See Ex Parte Levitt*, 302 U.S. at 634, 58 S. Ct. 1." 575 F.2d at 945.

The court today thus either distinguishes *American Jewish Congress* because the plaintiffs before us are black, *see, e.g.*, maj. op. at 25 (noting the "centrality" in our post-Civil War constitutional order of the right of black citizens to be free from discrimination), or implicitly overrules that decision. I find it difficult to credit the majority's apparent distinction of that case, maj. op. at 17 n.24, which suggests that future plaintiffs may secure standing in federal court simply by alleging that "the government action in question contributed to perpetuation *within our borders* of a view of [them] as

persons of lesser worth," *id.*, especially when the *American Jewish Congress* plaintiffs complained specifically about "the degree to which American citizens of the Jewish faith are discriminated against . . . ." Brief for Appellants at 6, *American Jewish Congress v. Vance*, 575 F.2d 939 (D.C. Cir. 1978). Moreover, this distinction simply begs the question since every form of illegal discrimination presumably contributes to a view of that class of citizens as persons of lesser worth.

The consistent emphasis throughout the majority opinion upon the significance of the "right" asserted in this case suggests another impermissible factor underlying the court's decision. Relying primarily upon certain language from *Norwood*, the court defines the right asserted here as "the right of black citizens to insist that their government 'steer clear' of aiding" institutions that discriminate. Maj. op. at 24-25. Because of the significance of this right, it seems, the majority does not apply the principles of standing applicable to other plaintiffs attempting to assert other rights. Consequently, underlying the whole of the majority opinion is a rejection of the Supreme Court's statement in *Flast v. Cohen*, 392 U.S. 83, 99 (1968), that "[t]he fundamental aspect of standing is that it focuses on the *party* seeking to get his complaint before a federal court *and not on the issues* he wishes to have adjudicated." (emphasis added). In other words,

> no matter how inclined we may be toward appellant's position on the merits, we must first satisfy ourselves that he "has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."

Reuss v. Balles, 584 F.2d 461, 465 (D.C. Cir. 1978) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)

(quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)), *cert. denied*, 439 U.S. 997 (1978). *See also Doherty v. Rutgers School of Law—Newark*, 487 F. Supp. 1291, 1298 (D.N.J. 1980).[10] The majority thus errs by finding standing through "premature evaluation of the merits of [plaintiffs'] complaint." *Schlesinger v. Reservists Committee*, 418 U.S. at 225.

Plaintiffs have argued to this court that as black parents and schoolchildren they are entitled to challenge IRS enforcement procedures, the inadequacy of which they claim interferes with their right to a desegregated education. I believe, however, that these plaintiffs have failed to plead injury in fact.[11] They have failed to

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[10] Even apart from this impermissible orientation, the majority opinion errs in seizing upon language in *Norwood* to delineate the constitutional right asserted in this case. Black citizens, indeed all citizens, possess the constitutional right to be free from unlawful discrimination. The court decides today that all black citizens possess the right to insist that the government "steer clear" of aiding any such discrimination. In my opinion the Constitution neither requires the government to take this driving test at the behest of every black citizen, nor does it permit a federal court to grade such a test.

The Constitution does require, of course, in a case appropriate for judicial resolution, that a federal court enjoin state action that significantly contributes to racial discrimination. *See* note 7 *supra*. That is not this case.

[11] Because I believe that the judgment of the district court should be affirmed on the grounds of lack of standing, I do not address the correctness of the remainder of the district court opinion. *See* maj. op. at 25-36. I trust, however, that the majority's passing comments on the scope of the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. III 1979), and the Tax Injunction Act, 26 U.S.C. § 7421(a) (Supp. III 1979), maj. op. at 32 n.52, are not meant to decide these questions. *See* maj. op. at 3 n.2. I do believe, moreover, that the considerations addressed by the district court, 480 F.Supp. at 797-99, caution against the finding of federal court juris-

"demonstrate a likelihood of benefit wholly apart from a defendant's response to the district court's decree." *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032, 1053 (2d Cir. 1977) (en banc) (Kaufman, J., concurring), *cert. denied*, 434 U.S. 1034 (1978).[12] Nowhere

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diction and certainly fail to support the court's pell-mell rush to grasp jurisdiction and reach the merits of this case. *See* Winpisinger v. Watson, 628 F.2d 133, 137-40 (D.C. Cir. 1980) (per curiam).

[12] The defendant in this case may be quite willing to respond to the district court's decree. Although the Service possesses certain jurisdictional objections to the granting of injunctive relief in this case, of which the plaintiffs' standing was primary, it does agree with plaintiffs that more effective enforcement procedures are warranted. If both named parties desire the same result, of course, no Article III case or controversy exists. GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971) (per curiam); Granfield v. Catholic Univ. of America, 530 F.2d 1035, 1044-45 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976); NAACP v. California, Civ. No. S-79-857 MLS (E.D. Ca., filed Apr. 3, 1981).

The majority opinion takes pains to emphasize that a "strong advocate of the private schools" is participating in this case. Maj. op. at 15. It is apparent, however, that "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1917 at 584 (1972) (footnotes omitted). *See* ICC v. Southern Railway, 380 F. Supp. 386, 394-95 (M.D. Ga. 1974), *aff'd in relevant part*, 543 F.2d 534 (5th Cir. 1976). Because this particular question requires close scrutiny and has not been raised before, however, I would not decide it at this time but leave it for the judgment of the district court in the first instance. Past indications suggest that the IRS might well welcome court-ordered enforcement of standards similar to those imposed in *Green* imposed nationwide. *See, e.g., Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Over-*

do they allege the predicate of discrimination necessary to invoke judicial power. Nevertheless, this court confers standing upon these plaintiffs in a decision that masquerades as a mere application of precedent.

The court's decision today reflects an approach to the question of standing that is simply and clearly wrong, the product of an impermissible shift in focus from the right of these plaintiffs to make their challenge to the rights they wish to assert. In its haste to afford plaintiffs an opportunity to vindicate their chosen cause, the majority not only expands significantly the law of standing but also oversteps the constitutional limits of its jurisprudential power.[13] As other courts have recognized,

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sight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 5-8 (1979) (statement of IRS Commissioner Jerome Kurtz); 44 Fed. Reg. 9451 (Feb. 13, 1979), *reprinted in Hearings, supra*, at 41; Memorandum Of Defendants In Response To Plaintiffs' Submission On The Merits at 25, Green v. Kennedy, No. 1355-69 (D.D.C. May 5, 1980). I note with some interest the failure of the Service to appeal from the granting of injunctive relief to the Mississippi plaintiffs in *Green*.

[13] The logical result of the court's holding today is, for example, that female plaintiffs may be heard to complain simply that certain public programs are not being administered efficiently and thereby operate to discriminate against others of their sex. Requirements of specificity and of injury in fact are therefore no longer applicable. *Cf.* Ridgefield Women's Political Caucus, Inc. v. Fossi, 458 F.Supp. 117, 120 n.3 (D.Conn. 1978).

Today's decision cannot be interpreted as merely an attempt to carve out an exception to the apparent ban against public interest tax litigation imposed in *Eastern Kentucky*. *Eastern Kentucky*, 426 U.S. at 26, 46 (Stewart, J., concurring). *See generally* Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, 57 TAXES 483 (1979); Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NATL. TAX J. 373 (1974). Rather, the analysis employed in today's decision, relying as it does

issues of great import fail to justify such overreaching.[14] This court would do well, therefore, to attend the following admonition of the Second Circuit:

> The Supreme Court has warned repeatedly in the past of the hazards in straying from the Constitutional requirement of a case or controversy. Absent adherence to the Constitutional mandate, courts become forums for the vindication of personal values and political preferences, usurping the legislative branch as the focus for public debate and lobby, and usurping as well the executive's primary responsibility for the implementation of federal law. Federal courts cannot, consistent with the Constitution, exercise their jurisdiction to vindicate litigants' chosen causes; *they are empowered only to grant specific relief in response to, and in order to remedy, a particularized showing of individual injury.*

Evans v. Lynn, 537 F.2d 571, 595-96 (1976) (en banc) (footnotes omitted), *cert. denied*, 429 U.S. 1066 (1977).

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upon the binding effect of *Norwood* and *Gilmore*, neither of which involved tax exemptions, necessarily applies to all charges of unlawful discrimination and, it would seem, to all alleged violations of constitutional rights.

[14] *See, e.g.*, Lamar v. Whiteside, 606 F.2d 88 (5th Cir. 1979) (per curiam) (prison inmates lack standing to challenge hiring discrimination by parole officials); Mulqueeny v. Nat'l Comm'n on the Observance of Int'l Women's Year, 1975, 549 F.2d 1115 (7th Cir. 1977) (interest in defeat of the Equal Rights Amendment cannot suffice to confer standing to attack alleged lobbying activities by the Commission in support of the Amendment); Urban Contractors Alliance v. Bi-State Dev. Agency, 531 F.2d 877 (8th Cir. 1976) (allegations of racial discrimination insufficient to confer standing absent allegations of personal injury). *But see* Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980) (plaintiffs have standing as "testers" under the Fair Housing Act to challenge racial discrimination in the rental of housing accommodations), *cert. granted sub nom.* Havens Realty Corp. v. Coleman, 49 U.S.L.W. 3788 (U.S. Apr. 20, 1981) (No. 80-988).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 80-1124
Civil Action No. 76-1426

INEZ WRIGHT, individually and on behalf of her minor children, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT and EPHRON ANTONI WRIGHT, JR., et al.,
Appellants

v.

DONALD T. REGAN, Secretary of the Treasury, et al.

ARGUED February 17, 1981

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

ORDER

Filed August 26, 1981

On consideration of the petition for rehearing of the Federal appellees filed August 1, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
George A. Fisher,
Clerk
By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 80-1124
Civil Action No. 76-1426

INEZ WRIGHT, individually and on behalf of her minor children, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT and EPHRON ANTONI WRIGHT, JR., et al.,
Appellants

v.

DONALD T. REGAN, Secretary of the Treasury, et al.

ARGUED February 17, 1981

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Filed August 26, 1981

The suggestion for rehearing *en banc* of the Federal appellees has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
George A. Fisher,
Clerk
By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon and Robb would rehear this case *en banc*.

APPENDIX E

Rev. Proc. 75-50 [1]

SECTION 1. PURPOSE

.01 This Revenue Procedure sets forth guidelines and recordkeeping requirements for determining whether private schools that are applying for recognition of exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, or are presently recognized as exempt from tax, have racially nondiscriminatory policies as to students.

SEC. 2. BACKGROUND.

.01 A school that does not have a racially nondiscriminatory policy as to students does not qualify as an organization exempt from Federal income tax. Rev. Rul. 71-447, 1971-2 C.B. 230.

.02 A school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general policy and that since the adoption of that policy it has operated as a bona fide manner in accordance therewith.

.03 Internal Revenue Service experience with private schools has shown a need for more specific guidelines to insure a uniform approach to the determination of whether a private school has a racially nondiscriminatory policy as to students.

.04 This Revenue Procedure does not apply to public schools.

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[1] Also released as TIR-1417 (M. A. 2433), dated Nov. 6, 1975.

SEC. 3. DEFINITIONS.

.01 Rev. Rul. 71-447 states that a racially nondiscriminatory policy as to students means:

> the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

.02 The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin. A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students.

.03 A school that selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis.

.04 For purposes of this revenue procedure, the term "school" has the same meaning it has in section 170(b)(1)(A)(ii) of the Code.

SEC. 4. GUIDELINES.

.01 *Organizational requirements.* A school must include a statement in its charter, bylaws, or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and therefore does not discriminate against applicants and students on the basis of race, color, and national ethnic origin.

.02 *Statement of Policy.* Every school must include a statement of its racially nondiscriminatory policy as to students in all its brochures and catalogues dealing with student admissions, programs, and scholarships. A statement substantially similar to the Notice described in subsection (a) of section 4.03, *infra*, will be acceptable for this purpose. Further, every school must include a reference to its racially nondiscriminatory policy in other written advertising that it uses as a means of informing prospective students of its programs. The following references will be acceptable:

The M school admits students of any race, color, and national or ethnic origin.

.03 *Publicity.* The school must make its racially nondiscriminatory policy known to all segments of the general community served by the school.

1 The school must use one of the following two methods to satisfy this requirement:

(a) The school may publish a notice of its racially nondiscriminatory policy in a newspaper of general circulation that serves all racial segments of the community. This publication must be repeated at least once annually during the period of the school's solicitation for students or, in the absence of a solicitation program, during the school's registration period. Where more than one community is served by a school, the school may publish its notice in those newspapers that are reasonably likely to be read by all racial segments of the communities that it serves. The notice must appear in a section of the newspaper likely to be read by prospective students and their families and it must occupy at least three column inches. It must be captioned in at least 12 point bold face type as a notice of nondiscriminatory policy as to students, and its text must be printed in at least 8 point type. The following notice will be acceptable:

NOTICE OF
NONDISCRIMINATORY POLICY
AS TO STUDENTS

The M schools admits student of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

(b) The school may use the broadcast media to publicize its racially nondiscriminatory policy if this use makes such nondiscriminatory policy known to all segments of the general community the school serves. If this method is chosen, the school must provide documentation that the means by which this policy was communicated to all segments of the general community was reasonably expected to be effective. In this case, appropriate documentation would include copies of the tapes or script used and records showing that there was an adequate number of announcements, that they were made during hours when the announcements were likely to be communicated to all segments of the general community, that they were of sufficient duration to convey the message clearly, and that they were broadcast on radio or television stations likely to be listened to by substantial numbers of members of all racial segments of the general community. Announcements must be made during the period of the school's solicitation for students or, in the absence of a solicitation program, during the school's registration period.

Communication of a racially nondiscriminatory policy as to students by a school to leaders of racial groups as the sole means of publicity generally will not be considered

effective to make the policy known to all segments of the community.

2 The requirements of subsection 1 of this section will not apply when one of the following paragraphs applies:

(a) If for the preceding three years the enrollment of a parochial or other church-related school consists of students at least 75 percent of whom are members of the sponsoring religious denomination or unit, the school may make known its racially nondiscriminatory policy in whatever newspapers or circulars the religious denomination or unit utilizes in the communities from which the students are drawn. These newspapers and circulars may be those distributed by a particular religious denomination or unit or by an association that represents a number of religious organizations of the same denomination. If, however, the school advertises in newspapers of general circulation in the community or communities from which its students are drawn and paragraphs (b) and (c) of this subsection are not applicable to it, then it must comply with paragraph (a) of subsection 1 of this section.

(b) If a school customarily draws a substantial percentage of its students nationwide or worldwide or from a large geographic section or sections of the United States and follows a racially nondiscriminatory policy as to students, the publicity requirement may be satisfied by complying with section 4.02, *supra*. Such a school may demonstrate that it follows a racially nondiscriminatory policy within the meaning of the preceding sentence either by showing that it currently enrolls students of racial minority groups in meaningful numbers or, when minority students are not enrolled in meaningful numbers, that its promotional activities and recruiting efforts in each geographic area were reasonably designed to inform students of all racial segments in the general communities within the area of the availability of the school. The question whether a school

satisfies the preceding sentence will be determined on the basis of the facts and circumstances of each case.

(c) If a school customarily draws its students from local communities and follows a racially nondiscriminatory policy as to students, the publicity requirement may be satisfied by complying with section 4.02, *supra*. Such a school may demonstrate that it follows a racially nondiscriminatory policy within the meaning of the preceding sentence by showing that it currently enrolls students of racial minority groups in meaningful numbers. The question whether a school satisfies the preceding sentence will be determined on the basis of the facts and circumstances of each case. One of the facts and circumstances that the Service will consider is whether the school's promotional activities and recruiting efforts in each area were reasonably designed to inform students of all racial segments in the general communities within the area of the availability of the school. The Service recognizes that the failure by a school drawing its students from local communities to enroll racial minority group students may not necessarily indicate the absence of a racially nondiscriminatory policy as to students when there are relatively few or no such students in these communities. Actual enrollment is, however, a meaningful indication of a racially nondiscriminatory policy in a community in which a public school or schools became subject to a desegregation order of a federal court or otherwise expressly became obligated to implement a desegregation plan under the terms of any written contract or other commitment to which any Federal agency was a party.

The Service encourages schools to satisfy the publicity requirement by the methods described in subsection 1 of this section, regardless of whether a school considers itself within subsection 2, because it believes these methods to be the most effective to make known a school's racially nondiscriminatory policy. In this regard it is each school's

responsibility to determine whether paragraph (a), (b), or (c) of subsection 2 applies to it. On audit, a school must be prepared to demonstrate that the failure to publish its racially nondiscriminatory policy in accordance with subsection 1 of this section was justified by the application to it of paragraph (a), (b), or (c) of subsection 2. Further, a school must be prepared to demonstrate that it has publicly disavowed or repudiated any statements purported to have been made on its behalf (after November 6, 1975) that are contrary to its publicity of a racially nondiscriminatory policy as to students, to the extent that the school or its principal official were aware of such statements.

.04 *Facilities and Programs.* A school must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

.05 *Scholarship and loan programs.* As a general rule, all scholarship or other comparable benefits procurable for use at any given school must be offered on a racially nondiscriminatory basis. Their availability on this basis must be known throughout the general community being served by the school and should be referred to in the publicity required by this section in order for that school to be considered racially nondiscriminatory as to students. Consistent with section 3.02, *supra*, scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status. Financial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy similarly will not adversely affect the school's exempt status.

.06 *Certification.* An individual authorized to take official action on behalf of a school that claims to be racially nondiscriminatory as to students must certify annually, under penalties of perjury, on an Internal Revenue form to be

issued, that to best of his knowledge and belief the school has satisfied the applicable requirements of sections 4.01 through 4.05 of this Revenue Procedure.

.07 *Faculty and Staff.* The existence of a racially discriminatory policy with respect to employment of faculty and administrative staff is indicative of a racially discriminatory policy as to students. Conversely, the absence of racial discrimination in employment of faculty and administrative staff is indicative of a racially nondiscriminatory policy as to students.

.02 *Failure to comply.* Failure to comply with the guidelines will ordinarily result in the proposed revocation of the exempt status of a school in accordance with the procedures set forth in Rev. Pros. 72-4, 1972-1 C.B. 706.

SEC. 5. APPLICATIONS FOR TAX EXEMPT STATUS.

.01 *Information required to be submitted.* Every school filing an application for recognition of a tax exempt status must supply the Service with the following information:

1 Racial composition, as of the current academic year and projected so far as may be feasible for the subsequent year, of—

(a) Student body, and

(b) Faculty and administrative staff.

2 Amount of scholarship and loan funds, if any, awarded to students enrolled and racial composition of students who have received such awards.

3 A listing of incorporators, founders, board members, and donors of land or buildings, whether individuals or organizations.

4 A statement whether any of the organizations described in subsection .01-3 of this section have at the time the application is filed an objective of maintaining segregated public

or private school education and, if so, a statement whether any of the individuals described in subsection .01-3 of this section are officers or active members of such organizations at the time the application is field.

5 Year of organization.

.02 *Limitations.*

1 For purposes of section 5.01, the racial composition of the student body, faculty, and administrative staff may be an estimate based on the best information readily available to the school, without requiring student applicants, students, faculty, or administrative staff to submit information to the school that the school otherwise does not require. However, a statement of the method by which the racial composition was determined must be supplied.

2 The information required to be submitted under section 5.01 should not identify individual students or members of the faculty and administrative staff.

SEC. 6. PUBLIC COMPLAINTS OF RACIAL DISCRIMINATION.

The Service is interested in receiving any information that an exempt private school is not operating under a racially nondiscriminatory policy as to students, including any judicial or administrative determinations to this effect. This information may be sent to the local District Director of Internal Revenue or to the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, Attention E:EO.

SEC. 7. RECORDKEEPING REQUIREMENTS.

.01 *Specific records.* Except as provided in section 7.03, each exempt private school must maintain for a minimum period of three years, beginning with the year after the year of compilation or acquisition, the following records for the use of the Service on proper request:

1 Records indicating the racial composition of the student body, faculty, and administrative staff for each academic year.

2 Records sufficient to document that scholarship and other financial assistance is awarded on a racially nondiscriminatory basis.

3 Copies of all brochures, catalogues, and advertising dealing with student admissions, programs, and scholarships. Schools advertising nationally or in a large geographic segment or segments of the United States need only maintain a record sufficient to indicate when and in what publications their advertisements were placed.

4 Copies of all materials used by or on behalf of the school to solicit contributions.

.02 *Limitation.*

1 For purposes of section 7.01, the racial composition of the student body, faculty, and administrative staff may be an estimate based on the best information readily available to the school, without requiring student applicants, students, faculty, or administrative staff to submit information to the school that the school otherwise does not require. For each academic year, however, a record of the method by which racial composition is determined must be maintained. A school may not discontinue maintaining a system of records that reflects racial composition of students, faculty, and administrative staff used in November 6, 1975, unless it substitutes a different system that compiles substantially the same information, without the advance approval of the Internal Revenue Service.

2 The Service does not require that a school release personally identifiable records or personal information contained therein except in accordance with the requirements of the "Family Educational Rights and Privacy Act of 1974," 20 U.S.C. § 1232g(1974). Similarly, the Serv-

ice does not require a school to keep records the maintenance of which is prohibited under state or federal law.

.03 *Exceptions.* The records described in section 7.01 need not be independently maintained for Internal Revenue Service use if

1 Substantially the same information that each of these records would provide has been included in a report or reports filed in accordance with law with an agency or agencies of Federal, state, or local government, and this information is current within one year, and

2 The school maintains copies of these reports from which this information is readily obtainable. Records described in section 7.01 providing information not included in reports filed with an agency or agencies must be maintained by the school for Service use.

.04 *Failure to maintain records.* Failure to maintain or to produce upon the proper request the required records and information will create a presumption that the organization has failed to comply with these guidelines.

SEC. 8. MISSISSIPPI SCHOOLS

The United States District Court for the District of Columbia has ordered specific guidelines and recordkeeping requirements for Mississippi private schools. *Green v. Connally*, 330 F. Supp. 1150, aff'd. *sub nom. Coit v. Green*, 404 U.S. 997 (1971). To the extent that the requirements of the Court's Order vary from the guidelines and recordkeeping requirements set fourth in this Revenue Procedure, the Court's Order is controlling for Mississippi schools.

SEC. 9. EFFECTIVE DATE.

.01 Section 4.02 is not applicable until February 4, 1976.

.02 To the extent that the publicity requirements set forth in section 4.03, *supra*, differ from those set forth in

Rev. Pros. 72-54, 1972-2 C.B. 834, they shall not be effective until a school's first period of solicitation for students or, in the absence of a solicitation program, during the school's first registration period beginning after November 6, 1975.

.03 The recordkeeping requirements set forth in section 7, *supra*, shall not be effective until January 1, 1976.

SEC. 10. EFFECT ON OTHER DOCUMENTS.

Rev. Proc. 72-54 is superseded.

APPENDIX F

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Public Affairs Division
Washington, DC 20224
IR-2027

Washington, D.C.—Proposed guidelines to determine whether certain private schools claiming tax exemption are racially non-discriminatory were announced today by the Internal Revenue Service.

The guidelines, in the form of a proposed revenue procedure published for public comment, are attached and will also appear in the Federal Register for Aug. 22, 1978.

The proposed revenue procedure deals primarily with procedures to be employed by the Internal Revenue Service in cases of private elementary and secondary schools which have been adjudicated by a court or agency to be racially discriminatory or which were created or substantially expanded at or about the time of public school desegregation in the community and have little or no minority student enrollment.

Comments on the proposed procedure should be sent to the Commissioner of Internal Revenue, 1111 Constitution Ave., N.W. Washington, DC 20224, Attention: E:EO. Comments should be sent to that they are received by Oct. 23, 1978.

The revenue procedure will not be effective until public comments have been considered.

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DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

PROPOSED REVENUE PROCEDURE ON PRIVATE TAX-EXEMPT SCHOOLS

Proposed Revenue Procedure

AGENCY: Internal Revenue Service, Treasury.

ACTION: Proposed Revenue Procedure.

SUMMARY: This document contains a proposed revenue procedure which would set forth new guidelines the Internal Revenue Service will apply in determining whether certain private schools have racially discriminatory policies as to students and therefore are not qualified for tax exemption under the Internal Revenue Code.

DATES: Written comments must be delivered or mailed by Oct. 23, 1978. The proposed revenue procedure, if adopted, will be effective on the date of final publication.

ADDRESS: Send comments to: Commissioner of Internal Revenue, Attention: E:EO, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: James E. Griffith, of the Exempt Organizations Division, Internal Revenue Service, Washington, DC 20224 (202-566-6181).

SUPPLEMENTARY INFORMATION:

The proposed revenue procedure which is being published for public comment adopts new administrative guidelines with respect to certain private schools claiming tax exemption under section 501(c)(3) of the Internal Revenue Code. These guidelines will be used to determine whether such schools are in fact operated on a racially non-discriminatory basis. Private schools which are racially discriminatory are not entitled to tax exemption under section 501 (c)(3) of the Internal Revenue Code.

The proposed revenue procedure deals primarily with two types of schools: (1) those which have been held by a court or agency to be racially discriminatory, and (2) those which have an insignificant number of minority students and were formed or substantially expanded at or about the time of desegregation of the public schools in the community. Generally, the Service will consider these schools to be racially discriminatory unless the schools can show that they now have a significant minority enrollment or that they are in good faith operated on a nondiscriminatory basis. If the schools cannot make such showings, the Service will consider the schools to be racially discriminatory, and tax exemption will be revoked or denied. In certain cases, schools may be allowed a grace period to bring themselves into compliance with the guidelines.

In accordance with paragraph 5.b. of the proposed Treasury Directive appearing in the Federal Register for Wednesday, May 24, 1978 (43 FR 22319), this document does not meet the Treasury Department's criteria for significant regulations set forth in paragraph 8 of that proposed Treasury Directive.

PUBLIC COMMENTS

Before this proposed revenue procedure is adopted, consideration will be given to any written comments that are submitted (preferably six copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying.

/s/ Jerome Kurtz
Jerome Kurtz
Commissioner of Internal Revenue

The following revenue procedure is proposed for adoption.

SECTION 1. PURPOSE.

.01 This Revenue Procedure sets forth the guidelines the Internal Revenue Service will apply in determining whether certain private schools have racially discriminatory policies as to students and therefore are not qualified for tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954.

SEC. 2. BACKGROUND.

.01 A school that does not have a racially nondiscriminatory policy as to students does not qualify as an organization exempt from Federal income tax. Revenue Ruling 71-447, 1971-2 C.B. 230.

.02 Revenue Procedure 75-50, 1975-2 C.B. 587, sets forth certain affirmative record keeping and publicity requirements along with other guidelines for determining whether schools have racially nondiscriminatory policies as to students.

.03 This Revenue Procedure sets forth more definitive guidelines to identify those schools that in fact operate on a discriminatory basis even though they may claim to have racially nondiscriminatory policies. This Revenue Procedure also sets forth the procedures by which the exemption of such schools will be revoked or denied.

.04 Generally, this Revenue Procedure applies to private elementary and secondary schools. In appropriate cases, however, such as where a private college or university is adjudiacted to be discriminatory, the Service may apply the principles reflected in this Revenue Procedure to other types of schools. All schools exempt under section 501(c)(3) of the Code continue to be governed by Revenue Procedure 75-50. This Revenue Procedure also applies to church-related and church-operated schools described in Revenue Ruling 75-231, 1975-1 C.B. 158.

.05 If there is any evidence that a school in fact has a racially discriminatory policy or practice the Service may find that the school is not entitled to exemption under Revenue Ruling 71-447, without regard to whether the school has complied with the guidelines set forth in this Revenue Procedure.

SEC. 3. DEFINITIONS.

.01 A racially nondiscriminatory policy as to students means that:

> the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Revenue Ruling 71-447, 1971-2 C.B. at 230. The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin. Revenue Procedure 75-50.

.02 A school "adjudicated to be discriminatory" means any school found to be discriminatory by a final decision of a Federal or state court of competent jurisdiction; by final agency action of a Federal administrative agency in accordance with the procedures of the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, or by final agency action of a state administrative agency following an adjudication in which the school was a party or otherwise had the opportunity for a hearing and an opportunity to submit evidence.

.03 "Reviewable school" means a school formed or substantially expanded at or about the time of public school desegregation in the community served by the school, and

having a student body whose percentage of minority students is less than 20 percent of the percentage of the minority school age population in the community served by the school. For example, if 50 percent of the school age population in the community were minority, and the school enrolls 200 students, a school would not be "reviewable" if it had at least 20 minority students. (20 percent × 50 percent = 10 percent. 10 percent × 200 students = 20 students.) Generally, a school formed or substantially expanded during any calendar year falling within the period beginning one year before implementation of an initial public school desegregation plan in the community (whether a court-ordered or voluntary plan) and ending three years after final implementation of such desegregation plan (or modifications thereof) will be considered as formed or substantially expanded at or about the time of public school desegregation. The time of the initial and final implementation of a desegregation plan will be determined with reference to the effective dates specified by the terms of the applicable court order or voluntary plan. "Voluntary plan" includes, for example, a written desegregation plan entered into with the Department of Health, Education and Welfare (HEW), or with a state agency. Whether a particular school will be considered substantially expanded is dependent upon all the facts and circumstances of such expansion including the percentage increase in the school's enrollment and the relationship between the school's expansion and the public school desegregation plan. However, a school will not be considered to have substantially expanded during a particular calendar year if the increase in the maximum number of students enrolled at any time during that calendar year is less than 10 percent of the maximum number of students enrolled at any time during the immediately preceding calendar year, and if such increase is not attributable to the addition of a new grade or grades.

.04 "Other school" means a school neither "adjudicated to be discriminatory" nor "reviewable."

.05 "Minority" is defined as including the following separate categories: blacks; Hispanics; Asians or Pacific Islanders; and, American Indians or Alaskan natives. These classifications are in accordance with guidelines of the Office of Management and Budget and the General Accounting Office, which are currently set forth at 41 Fed. Reg. 17,601 (1976). With respect to schools "adjudicated to be discriminatory" and "reviewable schools," the relevant minority for purposes of computing the percentage of minority enrollment under this Revenue Procedure is the group or groups found to have been the object of discrimination in the court or agency adjudication, or in the school desegregation proceeding. For example, if both blacks and Hispanics have been found in a court or agency adjudication to have been the object of discrimination, the appropriate percentage of minority students will be determined separately for blacks and for Hispanics.

.06 "Community" means the geographical area of the public school district within which the school is located, together with any other public school district from which the school enrolls at least five percent of its student body. Where a court desegregation order involves the mandatory assignment of students to or from either of such foregoing school districts, "community" includes the geographical area of all the districts, including those covered by the order, and the appropriate percentage of minority students will be determined with reference to all such districts. Where a number of schools in different locations are operated by the same organization, "community" will be defined separately for each school, and the appropriate percentage of minority students will be determined separately for each school. In determining minority school age population, the Service will rely generally on statistics compiled by the Department of Health, Education and Welfare (HEW) on public school enrollment, unless the school can furnish acceptable statistics relating to its community showing both public and private school enrollment. The enrollment data

used by HEW concerning the minority school age population of a public school district may be obtained from local school boards, which are required to maintain such information by HEW regulations.

SEC. 4. GUIDELINES.

.01 *Schools adjudicated to be discriminatory.* A school adjudicated to be discriminatory will be considered by the Service to have a racially discriminatory policy as to students unless the school can demonstrate either—

1 Actual enrollment of minority students such that the percentage of minority students in the school is at least 20 percent of the percentage of the minority school age population in the community, or

2 Operation in good faith on a racially nondiscriminatory basis as evidenced by the existence of at least four of the five factors set forth in section 4.03, *infra*. Only in rare and unusual circumstances will a school be considered to be operated in good faith on a nondiscriminatory basis if the school does not enroll some minority students.

.02 *"Reviewable schools."* A prima facie case of racial discrimination by a school arises from evidence that the school (1) was formed or substantially expanded at or about the time of desegregation of public schools, and, (2) has an insignificant number of minority students. In such a case, the school has the burden of clearly and convincingly rebutting this prima facie case of racial discrimination by showing that it has undertaken affirmative steps to secure minority students. Mere denial of a discriminatory purpose is insufficient. See *Norwood v. Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974), on remand from the Supreme Court, 413 U.S. 455 (1973). See also *Green v. Connally*, 330 F. Supp. 1150 (D. D.C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971). A "reviewable school" will be considered by the Service to have a racially dis-

criminatory policy as to students until the school can demonstrate either—

1 Actual enrollment of minority students such that the percentage of minority students enrolled in the school is at least 20 percent of the percentage of the minority school age population in the community, or

2 Operation in good faith on a racially nondiscriminatory basis as evidenced by the existence of at least four of the five factors set forth in section 4.03, *infra*. Only in rare and unusual circumstances will a school be considered to be operated in good faith on a nondiscriminatory basis if the school does not enroll some minority students.

.03 *Operation in good faith on a racially nondiscriminatory basis.* The following five factors evidence operation in good faith on a nondiscriminatory basis—

1 Availability of and granting of scholarships or other financial assistance on a significant basis to minority students.

2 Active and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified.

3 An increasing percentage of minority student enrollment.

4 Employment of minority teachers or professional staff.

5 Other substantial evidence of good faith, including evidence of a combination of lesser activities, such as—

(a) Continued and meaningful advertising programs beyond the requirements of Revenue Procedure 75-50, or contacts with minority leaders inviting applications from minority students.

(b) Significant efforts to recruit minority teachers.

(c) Participation with integrated schools in sports, music, and other events or activities.

(d) Making school facilities available to outside, integrated civic or charitable groups.

(e) Special minority-oriented curriculum or orientation programs.

(f) Minority participation in the founding of the school or current minority board members.

SEC. 5. SCHOOLS CURRENTLY RECOGNIZED AS TAX EXEMPT.

.01 *Schools adjudicated to be discriminatory and "reviewable schools."* For schools adjudicated to be discriminatory and "reviewable schools," the Service will propose revocation of exemption in accordance with existing Service procedures. In addition, the Service will propose suspension of advance assurance of deductibility of contributions in accordance with the procedures set forth in Revenue Procedure 72-39, 1972-2 C.B. 818. Under these procedures, a school can protest and administratively appeal this proposed action. During these procedures, if the school can show it meets the guidelines of section 4.01, or 4.02, *supra*, as relevant, the proposed revocation will be withdrawn, and suspension of advance assurance will be withdrawn.

.02 *Tax deductibility of contributions.* Generally, pursuant to section 3 of Revenue Procedure 72-39, the Service will allow a tax deduction for contributions made by persons unaware of the revocation of a school's exemption if such contributions are made on or before the date of publication of the Internal Revenue Bulletin announcing that contributions to the school are no longer deductible. Revenue Procedure 72-39 also provides, however, that the Service may disallow a tax deduction for any contribution made before such date if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was

in part responsible for, or was aware of, the school's racially discriminatory policy.

.03 *Grace period.* During such revocation procedures, if a school is able to show substantial and good faith progress in meeting the applicable guidelines of section 4.01 or 4.02, as relevant, a grace period may be allowed if the school agrees to meet the guidelines within some reasonable period, and also agrees not to institute a declaratory judgment action under section 7428 of the Code during such period. A grace period will not normally exceed two school years. The school will report its progress in meeting the guidelines to the Service during such grace period at such times and in such manner as the Service may require. During a grace period, the proposed revocation and suspension of advance assurance of deductibility of contributions will remain outstanding, and although exemption will continue in effect, contributors will not have advance assurance of deductibility of contributions. If the school meets the guidelines before the end of the grace period, the Service will withdraw the proposed revocation of exemption and rescind suspension of advance assurance. If the school fails to meet the guidelines by the end of the grace period, exemption will be revoked retroactively and contributions will not be deductible as of the date of suspension of advance assurance. The school may then seek declaratory judgment relief under section 7428.

.04 *Other schools.* In the case of an "other school" having insubstantial minority enrollment, the Service will closely scrutinize the policies and activities of the school upon examination, and the school must show that the insubstantial minority enrollment does not result from discrimination in its admissions policies and practices. If warranted by the facts and circumstances, these schools may be subject to procedures similar to those for "reviewable schools" under section 4.02, *supra.*

SEC. 6. APPLICATIONS FOR TAX EXEMPT STATUS.

.01 *Schools adjudicated to be discriminatory.* An adverse ruling or determination will be issued to a school adjudicated to be discriminatory unless it shows it meets the guidelines of section 4.01, *supra.* If during the Service's consideration of the school's application the school brings itself into compliance with the guidelines of section 4.01, a favorable ruling or determination will be issued.

.02 *"Reviewable schools."* An adverse ruling of determination will be issued to a "reviewable school" unless it shows it meets the guidelines of section 4.02, *supra.* If during the Service's consideration of the school's application the school brings itself into compliance with the guidelines of section 4.02, a favorable ruling or determination will be issued. Ordinarily, favorable rulings or determinations will not be issued to a newly created school with no record of operation formed at or about the time of public school desegregation in the community. Favorable rulings or determinations may be issued to newly created schools if, after some reasonable period of operation, they meet the guidelines of section 4.02.

.03 *Other schools.* Applications for recognition of exemption by "other schools" may be processed under procedures similar to those for a "reviewable school" under section 6.02, *supra,* if warranted by the facts and circumstances.

.04 *General guidelines.* Applications for tax exempt status submitted by all schools will be processed in accordance with the procedures set forth in Revenue Procedure 72-4. 1972-1 C.B. 706, superseded in part by Revenue Procedure 76-33, 1976-2 C.B. 655. Where the key District Director issues an adverse determination, the school will be advised of its right to protest the determination. Where the National Office issues an adverse ruling, the school will be afforded its protest and conference rights in the

National Office. After exhausting its administrative remedies, the school may seek declaratory judgment relief under section 7428 of the Code.

SEC. 7. EFFECTIVE DATE.

This Revenue Procedure will be effective on final publication. When effective, this Revenue Procedure will be applied by the Service to schools whose examinations are pending or are subsequently initiated. This Revenue Procedure will also be applied to schools whose applications for exemption are either under consideration or are subsequently filed.

SEC. 8. EFFECT ON OTHER DOCUMENTS.

Revenue Procedure 75-50 is amplified.

APPENDIX G

III. February 9, 1979 Version of IRS's Proposed Revenue Procedure

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, DC 20224
Tel. (202) 964-4021
IR-2091

Washington, D.C.—After considering public comments, the Internal Revenue Service today issued, in proposed form, a revised revenue procedure setting forth guidelines to implement the Service's obligation to limit tax exemption to private schools which operate on a racially nondiscriminatory basis.

Under the guidelines, the Service will examine certain schools and deny tax exemption where their actual operations are inconsistent with their stated policies of nondiscrimination.

The newly proposed procedure, on which public comments are invited, sets forth standards to be applied to two categories of private elementary and secondary schools: those that have been held by a court of government agency to be racially discriminatory ("adjudicated schools"); and those whose formation or expansion is related to public schools desegregation in the community served by the school, and do not have significant minority student enrollment ("reviewable schools").

The proposed guidelines do not apply to colleges, universities, nursery schools, or schools for the handicapped or the emotionally disturbed.

The new procedure is a revision of a proposal published in the Federal Register on August 22, 1978. It gives greater weight to each school's particular circumstances, than did

the earlier proposal, in determining whether a school is racially discriminatory as to students.

Under the new proposal, a school formed or substantially expanded at the time of public school desegregation will be classified as "reviewable" if it has an insignificant minority enrollment and its formation or expansion is related in fact to public school desegregation in the community. The procedure sets forth factors to be considered in making this determination.

A school classified as "reviewable" will be considered racially discriminatory unless it has undertaken actions and programs reasonably designed to attract minority students on a continuing basis. Unlike the earlier proposal, the new procedure does not require a minimum number of specified actions to be taken in every case. Rather, it provides greater flexibility for a school to show that it is operating on a racially nondiscriminatory basis.

Public comments on the new proposal should be submitted to the Internal Revenue Service by April 20, 1979.

A copy of the proposed revenue procedure is attached.

SECTION 1. PURPOSE.

.01 This Revenue Procedure sets forth guidelines the Internal Revenue Service will apply in determining whether certain private schools have racially discriminatory policies as to sutdents and therefore are not qualified for tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954.

SEC. 2. BACKGROUND.

.01 A school must have a racially nondiscriminatory policy as to students in order to qualify as an organization exempt from federal income tax. Revenue Ruling 71-447, 1971-2 C.B. 230. This requirement also applies to church-

related and church-operated schools. Revenue Ruling 75-231, 1975-1 C.B. 158.

.02 Revenue Procedure 75-50, 1975-2 C.B. 587, sets forth certain affirmative recordkeeping and publicity requirements along with other guidelines for determining whether schools have a racially nondiscriminatory policy as to students. Revenue Procedure 75-50 generally requires tax-exempt private schools to adopt formally a racially nondiscriminatory policy and to publicize that policy annually to the community.

.03 All private schools are subject to the requirement that they have a racially nondiscriminatory policy as to students in order to qualify for and retain tax exemption, and schools are subject to examination to verify the existence of that policy.

The question whether a private school has a racially nondiscriminatory policy as to students is based on all the applicable facts and circumstances.

If a school engages in any acts or practices that are racially discriminatory as to students, the school is not entitled to tax exemption even though it may otherwise comply with the provisions of Revenue Procedure 75-50 or this Revenue Procedure. For example, if there are overt acts of racial discrimination as to students, the school is not entitled to federal income tax exemption.

.04 There are situations in which a school's formation or expansion at the time of public school desegregation in the community casts doubt on the existence of a bona fide racially nondiscriminatory policy. In such situations the mere assertion and publication of a nondiscriminatory policy may be insufficient evidence of a bona fide nondiscriminatory policy. In these cases it is appropriate to examine whether actions have been taken by the school to overcome the indications that the school was established to foster racial segregation and that minorities are not wel-

come at the school. See *Norwood v. Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974), on remand from the Supreme Court, 413 U.S. 455 (1973); *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975).

This Revenue Procedure sets forth guidelines to identify certain private elementary and secondary schools that are racially discriminatory, even though they claim to have a racially nondiscriminatory policy as to students.

.05 This Revenue Procedure applies only to private elementary and secondary schools, other than schools organized and operated solely for the education of the handicapped or the emotionally disturbed. For example, it applies to church-related and church-operated elementary and secondary schools, but does not apply to colleges and universities, pre-schools, nursery schools, or schools for the blind or the deaf.

SEC. 3. DEFINITIONS.

.01 A racially nondiscriminatory policy as to students means that:

> the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Revenue Ruling 71-447. The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin. Revenue Procedure 75-50.

.02 A school "adjudicated to be discriminatory" means any school found to be racially discriminatory as to students by a final decision of a federal or state court of com-

petent jurisdiction; by final agency action of a federal administrative agency in accordance with the procedures of the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*; or by final agency action of a state administrative agency following a proceeding in which the school was a party or otherwise had the opportunity for a hearing and an opportunity to submit evidence. The terms "final decision of a federal or state court" and "final agency action" mean actions or decisions from which no further administrative or judicial appeal can be taken.

.03 "Reviewable school" means a school (i) formed or substantially expanded at the time of public school desegregation in the community served by the school, (ii) which does not have significant minority student enrollment; and, (iii) whose creation or substantial expansion was related in fact to public school desegregation in the community. A school will not be treated as a reviewable school unless all three of the foregoing characteristics exist.

(a) A school will be considered formed or substantially expanded at the time of public school desegregation in the community served by the school if its formation or expansion takes place during any calendar year any part of which falls within the period beginning one year before implementation of a public school desegregation plan in the community (whether a court-ordered or voluntary plan) and ending three years after substantial implementation of such desegregation order or plan. "Voluntary plan" includes, for example, a written desegregation plan entered into with the Department of Health, Education and Welfare (HEW), or with a state agency.

A school will not be considered to have substantially expanded during a particular calendar year if the increase in the maximum number of students enrolled at any time during that calendar year is 20 percent or less of the maximum number of students enrolled at any time during the immediately preceding calendar year. If the increase is

more than 20 percent, a determination will be made whether the expansion is related in fact to public school desegregation, as described in section 3.03(c), *infra*, before the school will be treated as a reviewable school.

(b) Whether a school's minority student enrollment is significant depends on all the relevant facts and circumstances. Consideration will be given to special circumstances which limit the school's ability to attract minority students, such as an emphasis on special programs or special curricula which by their nature are of interest only to identifiable groups which are not composed of a significant number of minority students, so long as such programs or curricula are not offered for the purpose of excluding minorities. In giving such consideration, the Service will also take into account whether schools in similar circumstances are not limited in their ability to attract minority students.

In any event, a school will be considered to have significant minority student enrollment if its percentage of minority students is 20 percent or more of the percentage of the minority school age population in the community served by the school. For example, if 50 percent of the school age population in the community is minority, and the school enrolls 200 students, a school would not be reviewable'' if it had at least 20 minority students. (20 percent $\times$ 50 percent = 10 percent. 10 percent $\times$ 200 students = 20 students.)

If a particular school which is part of a system of commonly supervised schools would be treated as not having significant minority student enrollment under the foregoing provisions, it may nevertheless be considered to have a significant minority student enrollment if all the following conditions are met:

1. Taking into account all schools operated by the system within the community, the school system, in the aggregate, has significant minority student enrollment;

2. The schools within the community serve designated geographical areas, which designations are based on considerations other than race; and

3. There is no evidence that the school system operates on a racially discriminatory basis, such as through the operation of a dual school system based on race.

(c) Ordinarily, the formation or substantial expansion of a school at the time of public school desegregation in the community will be considered to be related in fact to public school desegregation. However, notwithstanding this general rule, the Service will consider evidence that a school's formation or substantial expansion was not related in fact to public school desegregation in the community and that the school therefore is not a reviewable school. The determination that a school's formation or substantial expansion is not related in fact to public school desegregation must be based on objective evidence, taking into account all the facts and circumstances relating to the school's formation or expansion. The following are illustrative of facts which are relevant in making this determination, but these facts are not exclusive.

Facts tending to indicate that the formation or substantial expansion of a school was not related in fact to public school desegregation include the following:

(1) The students to whom the opening or substantial expansion of the school is attributable are not to any significant extent drawn from the public school grades subject to desegregation in the community served by the school. For example, the students may be drawn from other private schools, or from other areas not undergoing public school desegregation.

(2) The rate of expansion is not greater than the rate of expansion experienced by the school in years

prior to the time of public school desegregation, as defined in section 3.03(a) of this procedure.

(3) The expansion is attributable to an increase in the school age population in the community.

(4) The expansion results from a merger of the school with another private school and neither of the schools is otherwise "reviewable."

(5) The expansion is attributable to a continuation of previous periodic expansion by adding grade levels as the school's enrollment in lower grades advance, and the school does not enroll a significant number of new students in the newly added grades from the public schools.

(6) The school was formed or expanded in accordance with a long-standing practice of a religion or religious denomination which itself is not racially discriminatory to provide schools for religious education when circumstances are present making it practical to do so (such as a sufficient number of persons of that religious belief in the community to support the school), and such circumstances are not attributable to a purpose of excluding minorities.

(7) At the time of formation or expansion, the school had some minority students, faculty, or board members.

Facts tending to indicate that the formation or substantial expansion of a school was related in fact to public school desegregation in the community include:

(8) The opening or substantial expansion of the school occurs in one or more of the same grades that are subject to public school desegregation.

(9) The students who enroll are primarily drawn from the public schools.

(10) The school occupies or utilizes former public school facilities made available to the school in the course of implementation of the public school desegregation plan.

(11) The school is a member of an organization which practices or advocates racial segregation in schools.

(12) The school, or its founders, officers, substantial contributors or trustees, have engaged in efforts to oppose desegregation of the public schools.

(13) The school in practice limits enrollment to students from a geographic area (or areas) with few or no minorities, and this limitation coincides with a public school desegregation plan that involves exchanges of students between such area or areas and one or more other areas that have a substantial school age minority population.

(14) Non-minority faculty members added to the school's staff at the time of its formation or substantial expansion are drawn primarily from the public school system subject to desegregation.

.04 The "community" served by the school means the public school district within which the school is located, together with any other public school district from which the school enrolls a substantial percentage of its student body. As an objective guideline, the Service will consider 20 percent a substantial percentage of its student body. Where a court desegregation order involves the mandatory assignment of students to or from any of such foregoing school districts, "community" includes all public school districts covered by the order, and the appropriate percentage of minority students will be determined with reference to all such districts. For example, if the school is

located in public school district A, but draws 30 percent of its students from school district B, which is under a court-ordered busing program with school district C, the relevant community for the particular school, for purposes of computing the relevant minority school age population, is school districts A, B, and C.

For purposes of determining minority school age population, the Service will rely generally on statistics compiled by the Department of Health, Education and Welfare (HEW) on public school enrollment, unless the school furnishes acceptable statistics relating to its community showing both public and private school enrollment. The enrollment data used by HEW concerning the minority school age population of a public school district may be obtained from local school boards, which are required to maintain such information by HEW regulations.

.05 "Minority" is defined as including the following separate categories: blacks; Hispanics; Asians or Pacific Islanders; and, American Indians or Alaskan natives. These classifications are in accordance with guidelines of the Department of Commerce which are currently set forth at 43 Fed. Reg. 19,269 (1978). The relevant minority for purposes of computing the percentage of minority student enrollment under this Revenue Procedure is the group or groups found to have been the object of discrimination in the court or agency adjudication, or in the public school desegregation proceeding. For example, if both blacks and Hispanics have been found in a court or agency adjudication to have been the object of discrimination, the appropriate percentage of minority students will be determined separately for blacks and for Hispanics.

SEC. 4. GUIDELINES.

.01 *Schools adjudicated to be discriminatory.* Notwithstanding a prior adjudication of racial discrimination as to students, a school adjudicated to be racially discrimi-

natory as to students will be considered to be now operated on a nondiscriminatory basis if the school can show that:

(a) the school currently has significant minority enrollment, as defined in Section 3.03(b), *supra*; or,

(b) the school has undertaken actions or programs reasonably designed to attract minority students on a continuing basis. See section 4.03, *infra*, for examples of such actions or programs. Ordinarily, an adjudicated school will not be considered to be operated on a racially nondiscriminatory basis unless the school has enrolled some minority students.

.02 *"Reviewable schools."*—Notwithstanding the fact that a school is a reviewable school as defined in section 3.03, the school will be considered to have a racially nondiscriminatory policy as to students if the school can show that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis. See section 4.03, *infra*, for examples of such actions or programs.

.03 Actions and programs reasonably designed to attract minority students must convey clearly to the affected minority community that, notwithstanding the circumstances of the school's formation or expansion and the absence of a significant number of minority students, the school, in fact, is operating on a nondiscriminatory basis and minorities are welcome at the school. The level of actions and programs that are adequate may vary from school to school and depends on the circumstances of the school, including the level of minority student enrollment. Examples of actions and programs that may contribtue to attracting minority students on a continuing basis include:

1. Active and vigorous minority recruitment programs, such as extensive public advertisements in media designed to reach the minority community,

specifically inviting minority applicants; communication to minority groups and minority leaders in the community inviting minority applicants; personal contacts of prospective minority students; and, participation in local, regional, or national programs designed to develop new sources of minority recruitment for the school.

2. Publicized offering of tuition waivers, scholarships or other financial assistance, with emphasis on their availability for minority students; or, actual granting of such financial assistance to minority students.

3. Employment of, or substantial efforts to recruit, minority teachers or other professional staff.

4. Participation with integrated schools in sports, music, and other events or activities.

5. Special minority-oriented curriculum or orientation programs.

6. Minority members of the board or other governing body of the school.

The failure of such action or programs to obtain some minority student enrollment within a reasonable period of time will be a factor in determining whether such activities are adequate or are undertaken in good faith.

SEC. 5. PROCEDURES FOR HANDLING SCHOOLS CURRENTLY RECOGNIZED AS TAX-EXEMPT

.01 *Schools adjudicated to be discriminatory.* The Service will propose revocation of exemption for schools adjudicated to be discriminatory which do not meet the guidelines of section 4.01, *supra.*

.02 *"Reviewable schools".* The Service will propose revocation of exemption for reviewable schools which do not meet the guidelines of section 4.02, *supra.*

.03 *Tax deductibility of contributions.* The Service will apply the provisions of Revenue Procedure 72-39, 1972-2 C.B. 818, in determining the tax deductibility of contributions made to adjudicated or reviewable schools.

.04 *General Guidelines.* Proposed revocations of exemption will be processed in accordance with the procedures set forth in Revenue Procedure 73-8, 1973-1 C.B. 754, and this Revenue Procedure. After exhausting its administrative remedies, the school may seek judicial relief.

In appropriate cases, the Service will consider deferring issuing notice of a final revocation of exemption to a school not meeting the standards of this Revenue Procedure, if the school so requests and sets forth actions already taken and to be undertaken in good faith which demonstrate a racially nondiscriminatory policy in accordance with section 4 of this Revenue Procedure.

SEC. 6. APPLICATIONS FOR TAX-EXEMPT STATUS.

.01 *Schools adjudicated to be discriminatory.* A favorable ruling or determination will be issued to a school adjudicated to be discriminatory only if it meets the guidelines of section 4.01, *supra.*

.02 *"Reviewable schools".* A favorable ruling or determination will be issued to a reviewable school which has commenced operation only if it meets the guidelines of section 4.02, *supra.* A favorable ruling or determination will be issued to a school with no record of actual operation only if the school's proposed operations can be described in sufficient detail to permit a conclusion that the school will not be classified as a reviewable school, or will clearly meet the guidelines of section 4.02.

.03 *General guidelines.* Applications for tax-exempt status will be processed in accordance with the procedures set forth in Revenue Procedure 72-4, 1972-1 C.B. 706, and this Revenue Procedure. A school which has either received

an adverse ruling or determination or which has exhausted its administrative remedies may seek judicial relief.

SEC. 7. NATIONAL OFFICE APPEALS AND REVIEW.

Applications for exemption and examinations of private elementary and secondary schools will be reviewed in the National Office under procedures established by the Assistant Commissioner (Employee Plans and Exempt Organizations). Under this procedure, appeals from adverse key district actions in these cases will be considered by the National Office rather than the Regional Directors of Appeal.

SEC. 8. EFFECTIVE DATE.

In the case of schools adjudicated to be discriminatory, this Revenue Procedure will be effective on final publication for purposes of examinations and applications for exemptions. In the case of reviewable schools, this Revenue Procedure will be effective for purposes of examinations on and after January 1, 1980. For reviewable schools whose applications for exemption are pending on the date of final publication, but which do not meet the provisions of section 6 of this revenue procedure, the Service will, if requested by the school, defer any action on the application for exemption until January 1, 1980, to give the school an opportunity to supplement its application to demonstrate compliance with section 6. Otherwise, for purposes of applications for exemption by reviewable schools, this Revenue Procedure will be effective on final publication.

SEC. 9. EFFECT ON OTHER DOCUMENTS.

Revenue Procedure 75-50 is amplified, and continues to be applicable to all private schools, whether or not affected by this Revenue Procedure.

Joint Appendix

FILED
AUG 8 1983

Nos. 81-757 and 81-970

In the Supreme Court of the United States

OCTOBER TERM, 1982

W. WAYNE ALLEN, PETITIONER

v.

INEZ WRIGHT, ET AL.

DONALD T. REGAN,
SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

INEZ WRIGHT, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITIONS FOR CERTIORARI FILED
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The opinions of the district court and of the court of appeals, and the orders of the court of appeals denying the petition for rehearing of the federal appellees, are reproduced in the petition for certiorari in No. 81-757.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[DOCKET ENTRIES]

DATE		PROCEEDINGS
1976		
July	30	COMPLAINT, appendix A, appearance.
July	30	INTERROGATORIES by pltfs. to deft. #2; c/s 7-30-76.
July	30	SUMMONS (4) and copies (4) of complaint issued to defts., AG & AUSA. AUSA & #1 ser 8-4-76; AG ser 8-5-76 #2 ser 8-12-76
Aug	09	REASSIGNMENT of case from Judge Waddy to Judge Gasch. PRATT, J.
Sept	03	MOTION of pltf. to drop named pltf., Marie Matthews; P&A's; c/m 9-3-76.
Sept	29	MOTION of pltfs. for certification of class action; P&A's; c/m 9-29-76.
Oct	01	GENERAL Jurisdictional Objection of defts. to interrogatories of pltfs.; c/m 10-1-76.
Oct	01	MOTION of defts. to dismiss complaint of pltfs.; memorandum; exhibits A through G; c/m 10-1-76.
Oct	05	ORDER filed 10-4-76 granting motion of pltfs. to drop pltf., Marie Matthews; amending caption accordingly. (N) GASCH, J.
Oct	12	OPPOSITION of defendants to plaintiffs' motion for certification of class action; c/m 10-12-76.
Oct	22	MOTION by Briarcrest Baptist School System, Inc. of Memphis, Tennessee for leave to file brief amicus curiae in support of motion by defts. to dismiss; exhibits 1 thru 6; exhibit (amicus curiae brief); c/m 10-22-76.
Nov	08	STIPULATION of parties with approval of the Court extending ten days after Court rules on motion of deft. to dismiss complaint be-

fore Court rules on opposition of deft. to motion of pltf. for certification as class action. (fiat) (N) GASCH, J.

Nov 09 MEMORANDUM OF pltfs. in response to motion for leave to file brief amicus curiae by Briarcrest Baptist School System, Inc. in support of motion to dismiss; c/m 11-9-76.

Nov 15 MOTION of pltfs. for leave to file a memorandum in excess of page limitations; exhibit (P&A's); c/s 11-15-76.

Nov 16 MOTION by pltfs. to consolidate C.A. 76-1426 with C.A. 1355-69; P&A's; attachment; c/m 11-15-76.

Nov 18 RESPONSE of applicant Amicus, Briarcrest Baptist School System, Inc. to request of pltfs. to strike affidavit and factual allegations; c/m 11-15-76.

Nov 23 ORDER filed 11-22-76 denying motion of pltf. to file opposition to motion of deft. in excess of page limit; pltf.'s memorandum shall be properly resubmitted within five (5) days of this date. (N) GASCH, J.

Nov 24 OPPOSITION of defts. to motion of pltfs. to consolidate; c/m 11-23-76.

Nov 24 MEMORANDUM of points & authorities by pltfs. in opposition to motion of defts. to dismiss; exhibit A; exhibits 1-7; c/s 11-24-76.

1977

Feb 01 MOTION by W. Wayne Allen to intervene as a deft.; memorandum; table of cases; exhibit (motion of intervenor to dismiss); c/m 2-1-77. $5.00 paid & credited to U.S. by Phillip D. Bostwick. Appearance of Phillip D. Bostwick (1800-M Street, N.W., Washington, D.C. 20036, phone 331-4100).

Apr 06 ORDER filed 4-5-77 granting motion of pltfs. to substitute W. Michael Blumenthal and William E. Williams for Connally and

Thrower; granting motions of parties leave to file in excess of 35 page limitation; granting motion of pltf. to consolidate C.A. 76-1426 with C.A. 1355-69; setting a hearing on all other pending motions for 4-25-77 at 10:00 A.M. (N) WADDY, J.

Apr 06 MEMORANDUM of points & authorities by pltfs. in opposition to motion of defts. to dismiss; c/s 11-15-76.

Apr 07 REASSIGNMENT of case from Judge Gasch to Judge Waddy. PRATT, J.

May 10 COPY OF REPLY by defts. to opposition of pltfs. to motion of defts. to dismiss; c/s 5-10-77. (Orig. filed in C.A. 1355-69)

May 17 MOTION of Briarcrest School to file amicus curiae brief, heard and denied; Motion of Rev. Allen to intervene as deft., heard and granted; granting leave to deft., Allen to file brief without exhibits of Briarcrest School as part of their motion to dismiss; Motion of defts. to dismiss, heard and taken under advisement. (Rep: V. Marshall) WADDY, J.

May 26 ORDER denying motion to dismiss in C.A. 1355-69. (N) WADDY, J.

May 26 ORDER vacating, sua sponte, protective granted by Magistrate on 1-21-77. (N) WADDDY, J.

May 31 ORDER filed 5-27-77 granting leave to W. Wayne Allen to intervene as party deft., to file motion to dismiss and to adopt the brief of amicus curiae withous exhibits without prejudice; granting motion of Briarcrest to withdraw motion to file brief. (N) WADDY, J.

May 31 MOTION by deft.-intervenor to dismiss complaint; c/m 2-1-77.

1978

June 09 TRANSCRIPT of proceedings of May 17, 1978; pp. 1-108; Rep: Vernell Marshall (COURT COPY—filed in CA 1355-69).

June 21 REASSIGNMENT of case from Judge Waddy to Judge H. Greene. PRATT, J.

June 27 REASSIGNMENT of case from Judge H. Greene to Judge Waddy. PRATT, J.

July 20 SUPPLEMENTAL memorandum of intervenor, W. Wayne Allen, in support of his motion to dismiss.

July 28 RESPONSE by pltfs. to supplemental memorandum of intervenor.

Aug 07 REASSIGNMENT of case from Judge Waddy to Judge Hart. PRATT, J.

Sept 08 TRANSMITTAL of Defts of Proposed Guidelines for Private School Racial Non-Discrimination; Exhibit A.

Sept 15 STATUS HEARING: Briefs updating the motion to dismiss and opposition in the Wright case, CA76-1426 due 10-15-78. Hearing on motion to dismiss set 11-15-78 at 10:00 A.M. deft. to expedite revenue procedures determination. (Rep: V. Marshall) HART, J.

Oct 13 SUPPLEMENTAL Memorandum of pltfs. in opposition to motion of defts. to dismiss.

Oct 16 RENEWED Motion of defts. to dismiss complaint; memorandum.

Oct 19 SUPPLEMENTAL memorandum of intervenor Wayne Allen in support of motion to dismiss (fiat) HART, J.

Nov 13 REPORT by deft. on current status of Administrative proceedings before the Internal Revenue Service concerning proposed guidelines for determining whether private schools are racially non-discriminatory; copy of attestation by Joseph A. Tedesco.

Nov 14 LETTER dated 11-14-78 to Hart, J. postponing hearing on motion of defts. to dismiss and agreement of pltfs.

Nov 15 ORDER filed 11-14-78 postponing hearing on 11-15-78 on motion of deft. to dismiss to a future date to be determined by the Court. (N) HART, J.

1979

Apr 06 TRANSCRIPT of Proceedings of March 9, 1979; pages 1-34; Rep. Joan Blair; Court Copy. (Filed in CA 69-1355)

Oct 15 SECOND supplemental memorandum of intervenor Wayne Allen in support of motion to dismiss.

Oct 23 SECOND supplemental memorandum of pltffs. in opposition to defts. motion to dismiss.

Oct 25 RESPONSE of defts. to second supplemental memorandum of intervenor Wayne Allen in support of motion to dismiss and supplemental memorandum in support of defts. motion to dismiss; exhibits A, B & C.

Oct 25 MEMORANDUM by pltffs. in opposition to second supplemental memorandum of intervenor Wayne Allen in support of motion to dismiss.

Nov 20 MOTION of defts. to dismiss heard and taken under advisement. (Rep. Joan Blair) (N) HART, J.

Nov 26 OPINION. (N) HART, J.

Nov 27 ORDER filed Nov. 26, 1979 granting defts. motion to dismiss and dismissing the action with prejudice. The remaining issue of the "Green component" of this action, CA 69-1355 has been limited to whether or not defts. have complied with the injunction issued by the three judge court. (N) HART, J.

Nov 30 MOTION by William H. Green, et al, pltffs. in CA 1355-69, to amend judgment; attachment A & B.

Dec 10 REPLY of intervenor, W. Wayne Allen to pltffs. motion to amend judgment.

Dec 12 RESPONSE of *GREEN* pltffs. to reply of intervenor W. Wayne Allen concerning pltffs. motion to alter or amend judgment order in WRIGHT *v.* MILLER.

Dec 12 MEMORANDUM by defts. in response to pltffs motion to amend judgment.

Dec 21 ORDER filed Dec. 18, 1979 amending judgment entered 11-26-79 by deleting the following language "the remaining issue of the Green component of this action (formerly CA 69-1355) has been limited to whether or not defts. have complied with the injunction issued by the three-judge court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971)." (N) HART, J.

1980

Jan 25 NOTICE of Appeal by pltffs. from order entered Nov. 26, 1979 and amended Dec. 18, 1979; $5.00 filing fee and $65.00 USCA docketing fee paid and credited to the U.S.; copy sent to Donald Gavin & Phillip D. Bostwick.

Jan 28 COPY of notice of appeal and docket entries sent to USCA, USCA #80-11

Feb 08 TRANSCRIPT of Proceedings taken on 11-20-79; court's copy; pps 1-68 (filed in 1355-69) (Rep: Joan C. Blair) HART, J.

Feb 26 RECORD on Appeal delivered to USCA; Receipt ack.

Mar 14 MOTION by pltff. for order supplementing record on appeal.

Apr 10 ORDER filed Apr. 8, 1980 directing Clerk to withdraw Transcript of Defts. motion to dismiss dated Nov. 20, 1979 and filed Feb. 8,

1980 from C.A. 1355-69 *Green v. Miller* and to transmit said Transcript to the U.S. Court of Appeals for the D.C. Circuit for inclusion in C.A. 80-1124 *Wright v. Miller*, as a supplemental record on appeal; and directing Clerk to forward document described on docket sheet as "Sept. 08, 1978 transmittal of debts to Prepared Guidelines for Private School Racial Non-Discrimination; Exhibit A" to the U.S. Court of Appeals for the D.C. Circuit for inclusion in C.A. 80-1124 *Wright v. Miller*, as a supplemental record on appeal. (N) HART, J.

Apr 10 SUPPLEMENTAL Record on Appeal delivered to USCA; Receipt ack.

1982

Feb 18 COPY OF ORDER from USCA dated 2-18-82 denying application to consolidated USCA #82-1134 and USCA #80-1124; referring forthwith motion for an injunction pending appeal in 82-1134 to the motions panel for expeditious consideration; and setting forth directives for the Secretary of the Treasury and Commissioner of Internal Revenue. (See order for details). (orig filed in 69-1355)

Mar 24 COPY OF ORDER from USCA dated 3-24-82 continuing in force the Order of USCA dated 2-18-82

Apr 13 MOTION of pltfs for order preserving status quo; exhibits A, B, and C; memo of P&A's.

Apr 21 STATEMENT OF P&A'S of intervenor W. Wayne Allen, in response to motion for order preserving *status quo*.

Apr 22 RESPONSE of deft to pltfs' motion for order preserving status quo; attachment.

Apr 29 REPLY of pltfs to responses of defts and deft-intervenor.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

DATE	FILINGS—PROCEEDINGS	FILED
(B)1-28-80	Copy of notice of appeal and docket entries from District Court (n-5)	
(B)2-26-80	Certified Original Record (3 vols.); no transcript (n-7)	
(C)4-2-80	15—Appellants' brief (m-2)	
(C)4-2-80	7—Appendix (m-2)	
(B)4-10-80	Certified Original Supplemental Record with 1 envelope (n-6)	
(D)6-2-80	15—Appellee's (Wayne Allen) brief (m-30)	
(D)6-18-80	4—Appellant's motion pursuant to the all writs Act (28 U.S.C. § 1651; Rule 62(g), F.R. Civ. P.; and inherent powers doctrine for injunction pending appeal (m-18)	
(T)7-7-80	4—Appellee's (Allen) motion for stay in the event appellants' motion for injunction pending appeal is granted (m-30)	
(T)7-7-80	4—Appellee's (Allen) opposition to appellant's motion for injunction pending appeal (m-3)	
(D)7-8-80	15—Appellee's (Federal) brief (m-7)	
(D)7-10-80	4—Appellee's (Federal) response in opposition to appellant's motion for injunction pending appeal (m-10)	
(T)7-15-80	4—Appellants' reply in support of their motion for an injunction pending appeal (m-15)	
(D)7-21-80	15—Appellants' reply brief (m-21)	

(C)08-21-80	Per Curiam order denying appellants' motion for injunction; McGowan, Robb and Wald (who did not participate), CJs
(T)01-30-81	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellants—20 minutes; appellees—20 minutes
(T)02-09-81	15—Appellees' (Federal) supplemental brief (m-9)
(B)02-17-81	Argued before Wright*, Tamm and Ginsburg, CJ's
(C)03-02-81	4—Letter from counsel for appellees' (Fed) advising of additional authorities pursuant to FRAP 28(j) (m-26)
(R)06-18-81	Opinion for the Court filed by Circuit Judge Ginsburg
(R)06-18-81	Dissenting opinion filed by Circuit Judge Tamm
(R)06-18-81	Judgment reversing and the case is remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date
(V)07-06-81	1—Appellants' bill of costs (m-6)
(V)07-06-81	4—Appellee's (Wayne Allen) motion for stay of mandate pending application for writ certiorari (m-30)
(V)08-03-81	15—Appellees' (Federal) petition for rehearing and suggestion for rehearing en banc (m-3)
(C)08-26-81	Per Curiam order, en banc, denying appellees' (Fed) suggestion for rehearing en banc CJ Robinson; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs
(C)08-26-81	Per Curiam order denying appellees' (Fed) petition for rehearing; Wright, Tamm and Ginsburg, CJs

(V)09-3-81 4—Appellants' motion for leave to file opposition to appellee's (Allen) motion for stay of mandate (m-3)

(V)09-16-81 4—Appellees' motion for stay of mandate (m-16)

(V)09-23-81 4—Appellants' opposition to appellees' (Federal) motion for stay of mandate (m-22)

(B)09-30-81 Per Curiam order that appellants' motion for leave to file opposition, out of time, is granted and the Clerk is directed to file appellants' lodged opposition and to note the docket accordingly; and that appellee's motion to stay mandate be, and is hereby, granted. The Clerk is directed not to issue the mandate herein prior October 5, 1981, in view of movant's intention to file a timely petition to the Supreme Court for a writ of certiorari; Wright, Tamm (who would deny appellants' motion for leave to file, out of time) and Ginsburg, CJ's

(B)09-30-81 4—Appellants' opposition to motion for stay of mandate (m-3)—file per above order

(V)10-06-81 4—Appellee's (Allen) motion for order extending order staying mandate (m-5)

(V)10-09-81 4—Appellants' opposition to appellee's (Allen) motion for order extending order staying mandate (m-9)

(B)10-19-81 Per Curiam order that appellee's (Regan) motion to stay mandate is granted and the Clerk is directed not to issue the mandate herein prior to October 26, 1981. No further motion for stay will be entertained unless, prior to October 26, 1981, the federal appellees reach an ultimate determination concerning an application to the Supreme Court for a writ of certiorari to review this Court's decision, and

advise the Court of such determination; Wright, Tamm and Ginsburg, CJ's

(G)10-21-81 Per Curiam order that intervenor-appellee's (W. Wayne Allen) motion for stay of mandate is denied; Wright, Tamm and Ginsburg; CJs

(V)10-21-81 4—Letter dated 10/19/81 from counsel for Wayne Allen asking that the record be certified and transmitted to the Supreme Court (m-19)

(V)10-28-81 Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 10/20/81 in SC No. 81-757

(V)10-30-81 4—Appellees' (Federal) motion for stay of mandate (m-30)

(V)10-30-81 Certified copy of notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 10/20/81 in SC No. 81-757

(B)11-03-81 Clerk's order that upon payment of proper fee, the Clerk is directed to certify and transmit, to the Supreme Court of the United States, the entire record herein. In addition, the Clerk is directed to transmit, to the Supreme Court of the United States, the Certified Original Record (3 vols.) filed herein on February 26, 1980, and the Certified Original Supplemental Record with one envelope, filed on April 10, 1980.

(B)11-24-81 Per Curiam order that appellees' (federal) motion for further stay of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of thirty days from the date of this order; Wright, Tamm and Ginsburg, CJ's

(V)11-30-81 Notification from Clerk, Supreme Court that a petition for writ of certiorari was filed on 11/23/81 in SC No. 81-970

(V)02-10-82 4—Appellants' motion for injunction pending appeal or in the alternative for injunction under All Writs Act to preserve effectiveness of this Court's mandate (m-10)

(V)02-16-82 4—Appellee's (Allen) response to motion for injunction pending appeal (m-15)

(C)02-17-82 4—Appellee's (Fed) opposition to appellants' motion for injunction (m-17)

(C)02-17-82 4—Appellee's (Clarksdale Baptist Church) response to appellants' motion for injunction pending appeal or, in the alternative, for injunction under "All Writs Act" (m-16)

(C)02-18-82 Per Curiam order denying application to consolidate Nos. 80-1124 and 82-1134 and the motion for injunction pending appeal in 82-1134 be referred forthwith to the motions panel for expeditious consideration and the motion for relief under the "All Writs Act" in 80-1124 be filed and that a response thereto by the Secretary of Treasury and the Commissioner of Internal Revenue be filed within 15 days of the date of this order and that to preserve the status quo pending response to the motion in No. 80-1124 and, thereafter, the court's determination of its authority to consider and decide the issues presented, see *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see *Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students,"

as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom *Coit* v. *Green* 404 U.S. 997 (1971); Wright, Tamm and Ginsburg, CJs

(V)02-23-82 12—Appellants' reply pursuant to Rule 6(c) of the General Rules of this Court (m-23)

(V)03-05-82 4—Letter from counsel for appellees in response to request of the Court in its order of 2/18/82 (m-5)

(B)03-24-82 Per Curiam order that the Order of this Court of February 18, 1982, is continued in force as herein provided. That Order directed the Secretary of the Treasury and Commissioner of Internal Revenue "not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see *Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a 'racially non-discriminatory policy as to students,' as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971)." If appellants Wright, et al. do not notify this Court within 20 days from the date of this Order that they have filed in the District Court a motion for injunction requesting relief similar to the relief granted by this Court's February 18, 1982, Order, then this Court's Order of February 18, 1982, shall be vacated 20 days from the date of this Order. If appellants do so notify this Court, then this Court's Order of February 18, 1982, shall remain in effect until the District Court rules on the motion for injunction and

pending any appeal to this Court from that ruling. See F.R.A.P. 8(a) Wright, Tamm (who dissents from the foregoing order) and Ginsburg, CJ's

(C)04-13-82 11—Letter dated 4/13/82 from counsel for appellants advising that a motion for an injunction is being filed in the District (m-13)

(J)06-22-83 Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC Nos. 81-757 and 81-970 on 6-20-83

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, individually and on behalf of her minor children, OSCAR CLAY RENFRO, ANTHONY LEE RENFRO, LISA MARIE WRIGHT and EPHRON ANTONI WRIGHT, JR., 734 Barrett Place, Memphis, Tennessee (901/521-1588); GENEVA WALKER, individually and on behalf of her minor children, JOHNNY RANAE WALKER and VINCENT CALVETT WALKER, 786 North McNeil Street, Memphis, Tennessee (901/276-5057); DELORES G. BEAMON, individually and on behalf of her minor children, RYNTHIA BEAMON, REUBEN BEAMON, JR., CYNTHIA BEAMON, and MELVIN BEAMON, 343 Dyas Drive, Montgomery, Alabama (205/262-5519); MARY LOUISE BELSER, individually and on behalf of her minor children, CHARLOTTE BELSER, CONNIE BELSER, JANICE BELSER, LAWRENCE BELSER, MARVIN BELSER, and ANTHONY BELSER, 724 N. Union Circle, Montgomery, Alabama (205/269-9930); ETHERLINE HOUSE, individually and on behalf of her minor children, ELMORE HOUSE, ROGER HOUSE and ZACHARY HOUSE, 1575 Hale Street, Montgomery, Alabama (205/262-5519); LOU ELLA JACKSON, individually and on behalf of her minor children REGINA JACKSON, ANGELA JACKSON, PHYLLIS JACKSON, GREGORY JACKSON, MICHELE JACKSON, DORA LEE JACKSON, LEWIS JACKSON, JR. and SANDRA JACKSON, 4022 Berwick Drive, Montgomery, Alabama (205/281-3833); MARIE MATTHEWS, individually and on behalf of her minor children, WILLIE CLAY MATTHEWS, STEPHANIE MATTHEWS, MICHAEL JAMES MATTHEWS and ALEXANDER MATTHEWS, 1850 French Street, Montgomery, Alabama (205/262-5519); ELSIE R. WALKER, individually and on behalf of her minor children, SONJA S. WALKER and CORNELL E. WALKER, JR., Route 2 Box 209, Farmville, Virginia (804/392-6283); ANNA G. MILLER, individually and on behalf of her minor child, JOSEPH W. MILLER, JR., Route 2, Box 239, Farmville, Virginia (804/392-4991); CLYDIA KOEN, individually and on behalf of her minor children, ROBBIE KOEN and CARA KOEN, 302 Pyramid Court, Cairo, Illinois

(618/734-0732); ANNIE L. JOHNSON, individually and on behalf of her minor child, HOWARD JOHNSON, JR., 611 Pyramid Court, Cairo, Illinois (618/734-2635); MABLE HOLLIS, individually and on behalf of her minor children, BERNADIAN HOLLIS and FRANK HOLLIS, 432 16th Street, Cairo, Illinois (618/734-2446); HYLAND L. DAVIS, individually and on behalf of his minor children, DAMON A. DAVIS and TROY A. DAVIS, 1802 Duke Street, Beaufort, South Carolina (803/524-5697); LAWRENCE WASHINGTON, individually and on behalf of his minor children, YOULAND J. WASHINGTON and JERRY J. WASHINGTON, P.O. Box 17, Seabrook, South Carolina (803/846-8945); RENA M. ROBINSON, individually and on behalf of her minor children, ANGELA CHRISTINE ROBINSON and CAROL DENISE ROBINSON, P.O. Box 248, Bowman, South Carolina (803/829-2855); ROBERT C. ZIMMERMAN, individually and on behalf of his minor children, ROBERT ZIMMERMAN, JR., PAUL ZIMMERMAN, CYNTHIA ZIMMERMAN and ANDREA ZIMMERMAN, Route 1, Box 237BB, Bowman, South Carolina (803/829-2811); REV. JOHN WILBUR WRIGHT, individually and on behalf of his minor children, DEDRA OLETHER WRIGHT and JOHNCALVIN MCCURNELL WRIGHT, P.O. Box 591, Holly Hill, South Carolina (803/496-3780); LAVINIA WASHINGTON, individually and on behalf of her minor children, STEPHEN WASHINGTON, GREGORY WASHINGTON, ELIOT WASHINGTON and KEVIN WASHINGTON, P.O. Box 621, Holly Hill, South Carolina (no phone); ROBERT JACKSON, individually and on behalf of his minor child, ROBERT JACKSON, JR., 1040 Sixth, Natchitoches, Louisiana (318/352-5286); MOSES WILLIAMS, individually and on behalf of his minor children, RHONDA RENSE WILLIAMS, MATRA LUCILLE WILLIAMS and LULA MARIE WILLIAMS, 601 W. Green Street, Tallulah, Louisiana (318/574-2834); FRED BRACY and BETTY BRACY, on behalf of themselves and on behalf of their minor children, WILLIE BRACY and ROBERT BRACY, 4104 Church Street, Monroe, Louisiana (318/325-5457); ALMA LEE GRIFFIN and DARNELL GRIFFIN, on behalf of themselves and on behalf of their minor children, GREGORY GRIFFIN, CAROL DYNE GRIFFIN, VERLINE ANN GRIFFIN, CARMEN GRIFFIN, and TERRY GRIFFIN, 802 S. 20th Street, Monroe, Louisiana (318/387-8655); HERBERT H.

JACKSON, individually and on behalf of his minor children, CARLA CUMBERLANDER, VINCENT CUMBERLANDER, FRANCINE CUMBERLANDER, and HERBERT H. JACKSON, JR., 37 Schuyler Street, Roxbury, Massachusetts (617/427-8199); on behalf of themselves and all others similarly situated, plaintiffs,

vs.

WILLIAM SIMON, Secretary of the Treasury, 15th & Pennsylvania Avenue, Washington, D.C. 20220; DONALD C. ALEXANDER, Commissioner of the Internal Revenue Service, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT AND SUMMARY

1. Since the Supreme Court's historic decisions in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and the passage of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d *et seq.*, thousands of public school districts throughout the country have desegregated pursuant to court order or Department of Health, Education and Welfare (HEW) regulations and guidelines, under state law, or voluntarily. During this period, thousands of newly created and many existing private schools have provided racially segregated alternative educational opportunities for white children avoiding attendance in desegregating public school systems.

2. Contrary to law and their public responsibility, defendants have fostered and encouraged the development, operation and expansion of these racially segregated private schools by granting them, or the organizations that operate them, exemptions from federal income taxation pursuant to Section 501(a) of the Internal Revenue Code of 1954. In response to the decision of this court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), defendants have issued regulations prohibiting the grant of tax exemptions to racially segregated private schools. However, those regulations permit schools to receive tax exemptions merely on the basis of adopting and certifying—but not

implementing—a policy of nondiscrimination. Pursuant to these regulations, many private schools with insubstantial or nonexistent minority enrollments which operate in or serve desegregating public school districts have retained or continue to receive tax exemptions notwithstanding the fact that they provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts. Defendants have thereby ensured that these private schools will be exempt from federal income taxation, and that contributions to them will be deductible by corporate and individual donors for federal tax purposes. These federal tax benefits are important to the financial well-being of private segregated schools and significantly support their development, operation and expansion. Moreover, by facilitating the development, operation and expansion of racially segregated private schools which provide alternative educational opportunities for white children avoiding attendance in desegregating public school systems, defendants are thereby interfering with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have operated racially dual school systems.

3. The grant of federal tax exemptions to racially segregated private schools located in or serving desegregating public school districts violates Section 501(c)(3) of the Internal Revenue Code of 1954, Title VI of the Civil Rights Act of 1964, Section 1 of the Civil Rights Act of 1866, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and injures plaintiffs and their class in two respects. First, the exemptions constitute tangible financial aid and other assistance to racially segregated education. Second, the exemptions foster and encourage the development of institutions offering racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts, and thereby also interfere with the efforts of federal courts, HEW and local school authorities to desegregate racially dual school systems.

4. This action is accordingly brought by parents of black public school children on behalf of themselves and their

children and on behalf of all other parents of black students attending public schools in districts undergoing desegregation to enjoin defendants from continuing their support for racially segregated private schools. Plaintiffs seek declaratory and injunctive relief requiring defendants to deny all applications for tax-exempt status for, and to revoke tax exemptions now held by, all private schools, or the organizations that operate them, which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either—

(a) were established or expanded at or about the time the public school districts in which they are located or which they serve began desegregating;

(b) have been determined in adversary judicial or administrative proceedings to be racially segregated; or

(c) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems.

JURISDICTION

5. This cause of action arises under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d *et seq.*, (hereinafter "Title VI"); Sections 501 and 170(c) of the Internal Revenue Code of 1954 (hereinafter the "Code"); 26 U.S.C. Sections 501, 170(c); Section 1 of the Civil Rights Act of 1866, 42 U.S.C. Section 1981; Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.*, and the Fifth and Fourteenth Amendments to the Constitution of the United States. This court has jurisdiction of this action pursuant to 28 U.S.C. Sections 1331, 1343(4), 1361, 2201 and 2202 and 5 U.S.C. Sections 702-06. Venue is properly vested in this Court pursuant to 28 U.S.C. Section 1391(e). The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

PARTIES

6. Plaintiff INEZ WRIGHT brings this action individually and on behalf of her minor children, OSCAR CLAY RENFRO, age 16, ANTHONY LEE RENFRO, age 13, LISA MARIE WRIGHT, age 8, and EPHRON ANTONI WRIGHT, JR., age 7,

each of whom attends the public schools in Memphis, Tennessee. Plaintiff GENEVA WALKER brings this suit individually and on behalf of her minor children, JOHNNY RANAE WALKER, age 16, and VINCENT CALVETT WALKER, age 14, each of whom attends the public schools in Memphis, Tennessee.

7. Plaintiff DELORES G. BEAMON brings this suit individually and on behalf of her minor children, RYNTHIA BEAMON, age 17, REUBEN BEAMON, JR., age 14, CYNTHIA BEAMON, age 13, and MELVIN BEAMON, age 12, each of whom attends the public schools in Montgomery, Alabama. Plaintiff MARY LOUISE BELSER brings this suit individually and on behalf of her minor children, CHARLOTTE BELSER, age 18, CONNIE BELSER, age 16, JANICE BELSER, age 15, LAWRENCE BELSER, age 12, MARVIN BELSER, age 11, ANTHONY BELSER, age 7, each of whom attends the public schools in Montgomery, Alabama. Plaintiff ETHERLINE HOUSE brings this suit individually and on behalf of her minor children, ELMORE HOUSE, age 12, ROGER HOUSE, age 10, ZACHARY HOUSE, age 8, each of whom attends the public schools in Montgomery, Alabama. Plaintiff LOU ELLA JACKSON brings this suit individually and on behalf of her minor children REGINA JACKSON, age 18, ANGELA JACKSON, age 17, PHYLLIS JACKSON, age 16, GREGORY JACKSON, age 15, MICHELE JACKSON, age 14, DORA LEE JACKSON, age 13, LEWIS JACKSON, JR., age 12 and SANDRA JACKSON, age 10, each of whom attends the public schools of Montgomery, Alabama. Plaintiff MARIE MATTHEWS brings this suit individually and on behalf of her minor children, WILLIE CLAY MATTHEWS, age 15, STEPHANIE MATTHEWS, age 10, MICHAEL JAMES MATTHEWS, age 9, ALEXANDER MATTHEWS, age 5, each of whom attends the public schools in Montgomery, Alabama.

8. Plaintiff ELSIE R. WALKER brings this suit individually and on behalf of her minor children, SONJA S. WALKER, age 8, and CORNELL E. WALKER, JR., age 5, each of whom attends the public schools in Prince Edward County, Virginia. Plaintiff ANNA G. MILLER brings this suit individually and on behalf of her minor child, JOSEPH W. MILLER, JR., age 15, who attends public school in Price Edward County, Virginia.

9. Plaintiff MABLE HOLLIS brings this suit individually and on behalf of her minor children, BERNADIAN HOLLIS, age 12, and FRANK HOLLIS, age 7, each of whom attends the public schools in Cairo, Illinois. Plaintiff CLYDIA KOEN brings this suit individually and on behalf of her minor children, ROBBIE KOEN, age 12, and CARA KOEN, age 7, each of whom attends the public schools in Cairo, Illinois. Plaintiff ANNIE L. JOHNSON brings this suit individually and on behalf of her minor child, HOWARD JOHNSON, JR., age 18, who attends public school in Cairo, Illinois.

10. Plaintiff HYLAND L. DAVIS brings this suit individually and on behalf of his minor children, DAMON A. DAVIS, age 14, and TROY A. DAVIS, age 9, each of whom attends the public schools in Beaufort County, South Carolina. Plaintiff LAWRENCE WASHINGTON brings this suit individually and on behalf of his minor children, YOULAND J. WASHINGTON, age 16, and JERRY J. WASHINGTON, age 12, each of whom attends the public schools in Beaufort County, South Carolina.

11. Plaintiff RENA M. ROBINSON brings this suit individually and on behalf of her minor children, ANGELA CHRISTINE ROBINSON, age 16, and CAROL DENISE ROBINSON, age 8, each of whom attends the public schools in Orangeburg, South Carolina (School District Number 2). Plaintiff ROBERT C. ZIMMERMAN brings this suit individually and on behalf of his minor children, ROBERT ZIMMERMAN, JR., age 17, PAUL ZIMMERMAN, age 16, CYNTHIA ZIMMERMAN, age 15, and ANDREA ZIMMERMAN, age 7, each of whom attends the public schools in Orangeburg, South Carolina (School District Number 2).

12. Plaintiff REV. JOHN WILBUR WRIGHT brings this suit individually and on behalf of his minor children, DEDRA OLETHER WRIGHT, age 12, and JOHNCALVIN MCCURNELL WRIGHT, age 6, each of whom attends the public schools in Orangeburg, South Carolina (School District Number 3). Plaintiff LAVINIA WASHINGTON brings this suit individually and on behalf of her minor children, STEPHEN WASHINGTON, age 14, GREGORY WASHINGTON, age 13, ELIOT WASHINGTON, age 12, and KEVIN WASHINGTON, age 9, each of whom attends the public schools of Orangeburg, South Carolina (School District Number 3).

13. Plaintiff ROBERT JACKSON brings this suit individually and on behalf of his minor child, ROBERT JACKSON, age 14, who attends public school in Natchitoches Parish, Louisiana.

14. Plaintiff MOSES WILLIAMS brings this suit individually and on behalf of his minor children, RHONDA RENSE WILLIAMS, age 10, MATRA LUCILLE WILLIAMS, age 15, and LULA MARIE WILLIAMS, age 17, each of whom attends the public schools in Madison Parish, Louisiana.

15. Plaintiffs FRED BRACY and BETTY BRACY bring this action on behalf of themselves and on behalf of their minor children, WILLIE BRACY, age 16, and ROBERT BRACY, age 14, each of whom attends the public schools in Monroe, Louisiana. Plaintiffs ALMA LEE GRIFFIN and DARNELL GRIFFIN bring this action on behalf of themselves and on behalf of their minor children, GREGORY GRIFFIN, age 16, CAROL DYNE GRIFFIN, age 14, VERLINE ANN GRIFFIN, age 13, CARMEN GRIFFIN, age 9, and TERRY GRIFFIN, age 7, each of whom attends the public schools in Monroe, Louisiana.

16. Plaintiff HERBERT H. JACKSON brings this suit individually and on behalf of his minor children, CARLA CUMBERLANDER, age 13, VINCENT CUMBERLANDER, age 12, FRANCINE CUMBERLANDER, age 11, and HERBERT H. JACKSON, JR., age 12, each of whom attends the public schools in Boston, Massachusetts.

17. Defendant WILLIAM SIMON is the Secretary of the Treasury of the United States and has his principal place of business in Washington, D.C. Defendant DONALD C. ALEXANDER is Commissioner of the Internal Revenue Service and has his principal place of business in Washington, D.C. Both defendants are charged with administering and enforcing the Constitution and federal statues, including the Internal Revenue Code of 1954, 26 U.S.C. Sections 7801 and 7802.

CLASS ACTION

18. Plaintiffs bring this action on behalf of themselves and their children, and pursuant to Rule 23(b)2) of the Federal Rules of Civil Procedure, on behalf of all other parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation

pursuant to court order of HEW regulations and guidelines, under state law, or voluntarily. This class, which is estimated to include several million persons, is so large that joinder of all members is impracticable. There are questions of law or fact common to the class: the granting of tax exemptions to racially segregated academies and the impact of those exemptions are factual issues common to the class; and the unlawfulness or unconstitutionality of such tax benefits are legal issues common to the class. The claims of the representative parties are typical of the claims of the class. The named plaintiffs have no interests that conflict with those of other members of the class. The named plaintiffs will fairly and adequately protect the interests of the class; they constitute a representative sample of the class and are represented by counsel experienced in school desegregation and administrative litigation in the federal courts. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

PUBLIC SCHOOL DESEGRATION AND THE DEVELOPMENT OF PRIVATE ACADEMIES

19. In the two decades since the *Brown* decisions, federal courts have ordered the desegregation of hundreds of public school districts throughout the country. More than 3,000 additional public school districts have implemented, or are currently in the process of implementing, HEW-approved desegregation plans pursuant to Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs. Additional school districts have been desegregated by state court or administrative orders or have adopted voluntary desegregation plans. In the future, many additional school districts will begin desegregating pursuant to court order or HEW regulations and guidelines, under state law, or voluntarily.

20. Since 1954, thousands of newly created and many existing private schools have provided racially segregated alternative educational opportunities for white children avoiding attendance in desegregating public school systems. Most of these private schools were organized or expanded after the Supreme Court's decision in *Green* v.

County School Board, 391 U.S. 430 (1968), which found "freedom of choice" remedial plans inadequate and paved the way for extensive school desegregation throughout the nation. More specifically, many of these private schools were created or expanded at or about the time public school districts in which they are located or which they serve began desegregating. Upon information and belief, there are more than 3,500 racially segregated private academies operating in the country having a total enrollment of more than 750,000 children.

21. Defendants have fostered and encouraged the development, operation and expansion of many of these racially segregated private schools by recognizing them as "charitable" organizations described in Section 501(c)(3) of the Internal Revenue Code, and exempt from federal income taxation under Section 501(a) of the Code. Once the schools are classified as tax-exempt under Section 501(a), contributions made to them are deductible from gross income on individual and corporate income tax returns under Section 170(c) of the Code. Moreover, organizations recognized under Section 501(c)(3) are also exempt from federal social security taxes (FICA) pursuant to Section 3121(b)(8)(B) of the Code, 26 U.S.C. Section 3121(b)(8)(B), and from federal unemployment taxes (FUTA) pursuant to Section 3306(c)(8) of the Code, 26 U.S.C. Section 3306(c)(8). The resulting exemptions and deductions provide tangible financial aid and other benefits which support the operation of racially segregated private schools. In particular, the resulting deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts. Additionally, the existence of a federal tax exemption amounts to a federal stamp of approval which facilitates fund raising on behalf of racially segregated private schools. Finally, by supporting the development, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public schools, defendants are thereby interfering with the efforts of courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.

22. Many of the private schools described in the foregoing paragraphs have been found to discriminate on the basis of race, *see, e.g., Norwood* v. *Harrison*, 413 U.S. 455 (1973), and defendants have been ordered to revoke federal tax exemptions held by, and to cease granting exemptions to, such racially segregated private schools located in Mississippi, *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd. sub nom., Coit* v. *Green*, 404 U.S. 997 (1971). Notwithstanding these and other similar decisions, defendants have continued to grant federal tax exemptions to, and have failed to revoke federal tax exemptions held by, racially segregated private schools throughout the United States, many of which are providing white children with racially segregated alternatives to desegregating public school districts. Moreover, defendants have issued regulations regarding applications for tax-exempt status by private schools [40 Fed. Reg. 53409 (Nov. 18, 1975), attached hereto as Appendix A] which are inadequate to ensure compliance with the Internal Revenue Code and to protect the statutory and constitutional rights of plaintiffs. These regulations are legally insufficient because they permit private schools located in or serving desegregating public school districts to qualify for federal tax exemptions merely by adopting and publishing a "racially nondiscriminatory policy as to students" and by filing with defendants a certificate averring nondiscrimination. Pursuant to this policy, many private schools with insubstantial or nonexistent minority enrollments which were organized or expanded at or about the time public school districts in which they are located or which they serve were desegregating, have retained their federal tax exemptions merely by adopting and certifying—but not implementing—the required policy of nondiscrimination. Defendants have adopted no policies or procedures to determine whether private schools, or organizations operating private schools, which have insubstantial or nonexistent minority enrollments and which are located in or serve desegregating public school districts, but which have adopted and certified the required policy of nondiscrimination, are nevertheless in fact providing white chil-

dren with racially segregated alternatives to desegregating public schools.

23. Private schools which are the subject of this Complaint are those schools which have insubstantial or nonexistent minority enrollments and which are located in or serve desegregating public school districts. They fall into one of the following categories:

(a) Independent schools, separately incorporated and operating elementary and/or secondary schools which have received, applied for, or will apply for, their own tax exemptions under Section 501(a) of the Code (see paragraphs 24 to 37, *infra*); and

(b) Schools, either elementary and/or secondary, operating under the "umbrellas" of organizations which have received, applied for, or will apply for, tax-exempt status under Section 501(a) of the Code (see paragraphs 39 to 48, *infra*).

INDEPENDENT PRIVATE SCHOOLS WITH TAX-EXEMPT STATUS

24. Plaintiffs WRIGHT and WALKER are the parents of black minor children attending the public schools of Memphis, Tennessee. As a result of litigation commenced in 1960, the Memphis City Schools were finally desegregated pursuant to a series of court decisions from 1971 through 1973. During this period, many white children who left the Memphis public schools, together with other white children avoiding attendance in the public schools, enrolled in racially segregated private schools operating in and around Memphis.

25. For example, the Briarcrest Baptist School System of Memphis was incorporated in March, 1973 and opened in the fall of that year. It applied for and received a federal tax exemption from defendants in 1973. Briarcrest consists of a system of 12 elementary schools and one high school; its enrollment rose from 1,821 in 1973 when it was organized to 3,464 in 1975. Although its catalog and public notices state that it has a policy of nondiscrimination, and al-

though it has satisfied defendants in this regard, the System and each of its schools is racially segregated.

26. The Southern Baptist Schools of Whitehaven, Inc. was incorporated in Memphis in June, 1972 and opened in the fall of 1973. It applied for and received a federal tax exemption in 1972 under the name of the "Southern Baptist Educational Center of Whitehaven, Inc." Its enrollment in 1973 when it was organized was 767; its enrollment rose to 1,242 in 1975. Although it has announced a policy of nondiscrimination and although it has satisfied defendants in this regard, the school is racially segregated.

27. The Briarcrest Baptist School System and the Southern Baptist Schools of Whitehaven, Inc., together with other private schools operating in and around the Memphis area, provide white students with a racially segregated alternative to the public schools. By recognizing many of these schools as exempt from federal taxation (see paragraph 45, *infra*), defendants have facilitated their development and operation and the provision of racially segregated education opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Memphis public schools.

28. Plaintiff JACKSON is the parent of a black minor child attending the public schools of Natchitoches Parish, Louisiana. Pursuant to court order, the Natchitoches Parish schools began desegregation in September, 1969. In the same year, the Natchitoches Academy was organized and began operation. It obtained a federal tax exemption in 1972. During its first year of operation in 1969, it operated grades 1-8, and added grades 9-12 in the 1970 school year. It enrolled 83 students in the 1969 school year. In 1970, it enrolled 296 students. Its enrollment for the 1975 school year was 191 students. The Academy has never enrolled a black student or hired a black faculty member. Although the Academy has announced a policy of nondiscrimination, and although it has satisfied defendants in this regard, it is racially segregated. By recognizing the Academy as exempt from federal taxation, defendants are facilitating its

development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Natchitoches Parish public schools.

29. Plaintiffs WRIGHT and WASHINGTON are parents of black minor children attending the public schools of Orangeburg, South Carolina (School District Number 3). In 1970, a final court order was entered and HEW accepted District 3's asurance that a school desegregation plan would be implemented. In the same year, the Holly Hill Academy was organized and opened. The school was granted a federal tax exemption in 1970. Its enrollment ranged from 244 in 1970 when it was first opened to 270 in 1974. Although its public notices state that it follows a policy of nondiscrimination, and although it has satisfied defendants in this regard, the Academy is racially segregated. By recognizing the Academy as exempt from federal taxation, defendants have facilitated its development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court and HEW to desegregate the Orangeburg public schools.

30. Plaintiffs DAVIS and WASHINGTON are the parents of black minor children attending the public schools of Beaufort County, South Carolina. In 1969, following several months of negotiations, HEW concluded that it could not obtain voluntary compliance with Title VI and commenced formal enforcement proceedings against the Beaufort County School District. Following a hearing in February, 1970, an initial decision of noncompliance with Title VI against the County was issued by HEW. Settlement discussions began again, and in the spring of 1973, the County agreed to initiate a student assignment plan. (HEW proceedings regarding a remaining racially identifiable school are still pending). During much of this period, many white students left the Beaufort County public schools. Some of these stu-

dents, together with other students avoiding attendance in the Beaufort County public schools, enrolled in the Sea Pines Academy which had been organized and opened in 1966. In that same year, Sea Pines applied for a federal tax exemption which was granted in 1967. Its enrollment rose steadily from 16 students in 1966 to 300 in 1972; since then its enrollment has ranged from 240-272. In 1972, the Academy constructed new school buildings with donated funds on donated land. Although the Academy has announced a policy of nondiscrimination, and although it has satisfied defendants in this regard, it is racially segregated. By recognizing the Academy as exempt from federal taxation, defendants have facilitated its development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of HEW to desegregate the Beaufort County public schools.

31. Plaintiffs WALKER and MILLER are parents of black minor children attending public schools in Prince Edward County, Virginia. The United States District Court for the Eastern District of Virginia ordered the County School Board of Prince Edward County to desegregate its schools in 1959. In response, the County School Board closed the public schools, and in the same year the Prince Edward Academy was opened, and received a federal tax exemption. Its enrollment in 1959, its first year of operation, was 1,378 white children, virtually all of whom had previously attended the then-closed public schools. When the public school system was reopened in 1964, the student body was overwhelmingly black; in the same year, the enrollment at Prince Edward Academy remained relatively constant at approximately 1,242 white children. In 1970, only 64 of the 1,817 children attending the public schools were white; in the same year, the enrollment at Prince Edward Academy was 1,311 white students. Although the Prince Edward Academy has announced a policy of nondiscrimination, and although the Academy has satisfied defendants in this regard, it remains racially segregated. By recognizing the Academy as exempt from federal taxation, defendants have

facilitated its development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Prince Edward County public school system.

32. Plaintiffs BEAMON, BELSER, HOUSE, JACKSON and MATTHEWS are the parents of black minor children attending the public schools in Montgomery, Alabama. Pursuant to a federal court order entered in a suit which was originally filed in 1964, the Montgomery public schools began mandatory desegregation in September, 1970. Further desegregation measures were required by a 1974 Court order. During this period many white children left the Montgomery schools, and together with other white children avoiding attendance in the desegregating public schools, enrolled in racially segregated private schools operating in and around the Montgomery area.

33. For example, the Montgomery Academy is racially segregated and holds a federal tax exemption. Although it was organized in 1959, it has expanded continuously from 1964 to the present. Its enrollment has increased significantly in the wake of each major development in the public school desegregation litigation. In 1974, the Supreme Court of the United States affirmed a decision prohibiting the Montgomery Academy by name, together with other segregated academies in Montgomery (see paragraph 47, *infra*), from being afforded exclusive use of municipal recreation facilities. *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). Specifically, the Court held that permitting such segregated private schools to use municipal facilities significantly enhanced their attractiveness and thereby tended to undermine the federal court order desegregating the Montgomery public schools. Notwithstanding the fact that the Academy has announced a policy of nondiscrimination and has satisfied defendants in this regard, it is racially segregated. The Montgomery Academy, together with other private schools operating in and around the Montgomery area, provides white children with racially segregated alternatives to desegregating public schools. By recognizing these

private schools as exempt from federal taxation, defendants have facilitated their development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Montgomery public schools.

34. Plaintiffs KOEN, JOHNSON and HOLLIS are the parents of black minor children attending the public schools of Cairo, Illinois. The Cairo public schools were desegregated in September, 1967, after HEW found the system was racially segregated in violation of Title VI. Beginning in 1967, a substantial number of white children left the Cairo public schools, many of whom enrolled in the Camelot Parochial School which was organized in 1967 and began operation in September, 1969. The Camelot school has maintained an average annual enrollment of approximately 300 students. It received its federal tax exemption in 1970, before it was accredited as an educational institution by the State of Illinois, and has maintained its tax-exempt status since then notwithstanding the fact that in 1971, the Internal Revenue Service received a written complaint that the school was racially segregated. Although Camelot has an announced policy of nondiscrimination, and although it has satisfied defendants in this regard, its student body and faculty are now, and have always been, racially segregated. In a report issued in February, 1973, the U.S. Commission on Civil Rights reported that the Camelot school had attracted approximately 14 percent of the potential public school enrollment in Cairo, and encouraged the Internal Revenue Service to review its policy which permitted a private school such as Camelot to receive a federal tax exemption solely on the basis of an announced policy of nondiscrimination. The racially segregated condition of Camelot and the importance of its tax exemption were again emphasized in June, 1975 in a report issued by the Illinois Advisory Committee to the U.S. Commission on Civil Rights. However, the Camelot school remains tax-exempt. By recognizing the school as exempt from federal taxation, defendants have facilitated its development and operation and the pro-

vision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of HEW and local school authorities to desegregate the Cairo public schools.

35. Plaintiff JACKSON is the parent of black minor children attending the public schools in Boston, Massachusetts. Pursuant to court order, the Boston schools began desegregation in September, 1974, and an expanded desegregation plan was implemented in September, 1975. During the period 1973 to the present, the white enrollment in the Boston public schools has declined. Many of the white children who left the Boston public schools, together with other white children avoiding attendance in the Boston schools, are enrolling or have enrolled in racially segregated private schools operating in and around the Boston area.

36. For example, the Hyde Park Academy, the South Boston Heights Academy, and the Parkway Academy were all organized and began operations in September, 1975. The Hyde Park Academy has a total enrollment of 250 in grades 1-12. South Boston Heights Academy also has grades 1-12, and the Parkway Academy has an enrollment of 125 students in grades 1-8. Each of these schools is racially segregated.

37. These private schools, together with other racially segregated private schools, are providing white children with a racially segregated alternative to the desegregating Boston public schools. Upon information and belief, the Hyde Park Academy, the South Boston Heights Academy and the Parkway Academy have submitted applications for federal tax exemptions to defendants. If defendants are not restrained, they will grant these exemptions, which will have the effect of supporting the private academies and the provision of racially segregated alternatives to the Boston public schools. Defendants will thereby also interfere with the efforts of the United States District Court to eliminate the racially dual school system in Boston.

38. There are thousands of other racially segregated independent private schools which operate in or serve desegregating public school districts and which have received,

applied for, or will apply for, federal tax exemptions. Moreover, many additional public school districts will in the future begin desegregating pursuant to court order or HEW regulations and guidelines, under state law or voluntarily. Additional racially segregated private schools may be organized or expanded, many of which have received, applied for, or will apply for, federal tax exemptions. As in the case of the representative private schools discussed in paragraphs 24-37 above, such schools provide, or will provide, white children with racially segregated alternatives to desegregating public schools. By recognizing such schools as exempt from federal taxation, defendants facilitate their development, operation and expansion, and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants thereby also interfere with the efforts of federal courts, HEW, and local school authorities to eliminate racially dual school systems.

SCHOOLS OPERATING UNDER THE "UMBRELLA" OF TAX-EXEMPT ORGANIZATIONS

39. Plaintiff WILLIAMS is the parent of black minor children attending the public schools of Madison Parish, Louisiana. Pursuant to court order, the Madison Parish public schools were desegregated in September, 1969. Since then, many white students left the public schools of Madison Parish, and together with other white students avoiding attendance in the public schools, enrolled in two racially segregated private schools operating in Madison Parish.

40. The first of these schools, namely, the Delta Christian Academy, began operating during the 1968-1969 school year. During its first year of operation, it enrolled 198 white students in grades 1-8. The second of these private academies, namely, the Tallulah Academy, was organized during the 1969-1970 school year as the high school extension of the Delta Christian Academy. By the 1973-1974 school year, the combined enrollment of the two academies had increased to 476 white children.

41. In *Brumfield* v. *Dodd*, 405 F. Supp. 338 (E.D. La. 1975), the United States District Court found that neither academy had ever enrolled a black student or ever hired a

black faculty member. Moreover, the court held that both academies wre organized "as a direct response to the court-ordered integration of the parish's public schools." The court also found that the white students attending the academies "left the public school system as a result of the racial integration of such system" and that the two academies have "significantly interfered with the integration of the public schools of the parish."

42. Although neither of the academies is itself tax-exempt, both are owned by the Delta Christian School, Inc., a Louisiana corporation formed in 1967, which obtained a federal tax exemption in 1969. Donors can contribute funds to either academy through the Delta Christian School, Inc. and are thereby able to deduct such contributions from gross income for federal tax purposes. Although both academies have announced policies of nondiscrimination, and although Delta Christian School, Inc. has satisfied defendants in this regard, both academies are racially segregated. The Delta Christian Academy and the Tallulah Academy provide white children with a racially segregated alternative to desegregating public schools. By recognizing the Delta Christian School, Inc. as exempt from federal income taxation, defendants are facilitating the development and operation of the academies and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Madison Parish public schools.

43. Plaintiffs BRACY and GRIFFIN are parents of black minor children attending public schools in Monroe, Louisiana. Public school desegregation in Monroe was implemented in 1970 following a series of federal court decisions beginning in 1968. Since then many white students left the public schools of Monroe, and together with other white students avoiding attendance in the public schools, enrolled in racially segregated private schools operating in and around Monroe. For example, the River Oaks School was organized in Monroe in August, 1969 and opened the next month. The school's enrollment rose from 117 in 1969 when

it was first opened to 359 in 1973. The River Oaks School is not tax-exempt itself; however, it operates under the "umbrella" of the federal tax exemption held since 1970 by the Monroe Educational Foundation. Donors contribute funds to the Academy through the Monroe Educational Foundation and, notwithstanding the fact that the Academy is racially segregated, are thereby able to deduct such contributions from gross income for federal tax purposes.

44. The River Oaks School and the Monroe Educational Foundation, together with other private schools operating in and around Monroe, provide white students with a racially segregated alternative to desegregating public schools. By recognizing these schools, or the organizations which operate them, as exempt from federal income taxation, defendants are facilitating their development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Monroe public schools.

45. Plaintiffs WALTER and WRIGHT are parents of black minor children attending public schools in Memphis, Tennessee. As noted in paragraph 24, *supra*, when public school desegregation was implemented following a series of federal court decisions from 1971 to 1973, many white children who left the public schools enrolled in racially segregated private schools operating in and around the Memphis area. The Harding Academy was founded in 1952 and has operated under the "umbrella" of the federal tax exemption held by Harding College, Searcy, Arkansas. In the fall of 1972, Harding Academy began operating elementary schools in local Churches of Christ and constructed two junior high schools. During the period 1972 through 1975, the Academy's enrollment rose from 1,988 to 2,909. Although the Academy's brochure announces a policy of nondiscrimination, and although defendants have been satisfied in this regard, the Academy is racially segregated. The Harding Academy and Harding College, together with other private schools operating in and around Memphis, have provided white students with a racially segregated alternative to

desegregating public schools. By recognizing these schools, or the organizations which operate them, as exempt from federal income taxation, defendants are supporting their development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Memphis public schools.

46. Plaintiffs ROBINSON and ZIMMERMAN are parents of black minor children attending the public schools of Orangeburg, South Carolina (District Number 2). In 1967, a school desegregation plan for District 2 was approved by HEW. The Bowman Academy was organized in 1966 and opened for classes in the fall of 1970. The Academy's enrollment from 1970 to 1973 ranged from a low of 149 to a high of 178. It received a federal tax exemption in 1966, but in March, 1972, the defendants withdrew the Academy's exemption because it failed to adopt and certify the required policy of nondiscrimination. However, the Academy now operates under the exemption "umbrella" of the Southern Methodist Church of Orangeburg, South Carolina. Accordingly, although the Academy is racially segregated, donors can continue to deduct contributions to the Academy by funneling them through the Southern Methodist Church of Orangeburg. By recognizing the Southern Methodist Church of Orangeburg as exempt from federal taxation, defendants have facilitated the development and operation of the Bowman Academy and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of the United States District Court to desegregate the Orange public schools.

47. Plaintiffs BEAMON, BELSER, HOUSE, JACKSON and MATTHEWS are the parents of black minor children attending the public schools in Montgomery, Alabama. As paragraph 32, *supra*, indicates, the Montgomery schools have been involved in school desegregation litigation since 1964. During this period, many white children left the

Montgomery schools, and together with other white children avoiding attendance in the desegregating public schools, enrolled in racially segregated private schools operating in and around the Montgomery area. For example, the St. James Parish School, which was originally organized in 1955, has, like the Montgomery Academy (paragraph 33, *supra*), increased its enrollment significantly in the wake of each major development in the public school desegregation litigation. Also like the Montgomery Academy, the St. James Parish School is racially segregated and was one of the private academies identified in the decision affirmed by the Supreme Court in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974) (paragraph 33, *supra*).

48. From 1955 until 1970, the St. James Parish School did not have its own tax exemption. Rather, it operated under the umbrella of the exemption of the St. James Methodist Church of Montgomery. During that period contributions were made to the school through the St. James Methodist Church and were thereby deductible for federal income tax purposes. In 1970, the school severed its relationship with the St. James Methodist Church, but continued to receive tax deductible contributions either directly or through the church. However, in 1974, the same year in which the Montgomery public schools were required to implement further desegregation proceedings pursuant to federal court order, the school applied for its own federal tax exemption which it received in 1975. Although the St. James Parish School has an announced policy of nondiscrimination, and although it satisfied defendants in this regard, it is racially segregated. The St. James Parish School, together with other private schools operating in and around the Montgomery area, provides white children with a racially segregated alternative to desegregating public schools. By permitting the St. James Parish to receive tax deductible contributions through 1974, and by granting it a tax exemption in 1975, defendants have facilitated its development and operation and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public schools. Defendants have thereby also interfered with the efforts of

the United States District Court to desegregate the Montgomery public schools.

49. There are thousands of other racially segregated private schools which operate in or serve desegregating public school districts and which function under the umbrella of organizations which have received, applied for, or will apply for, federal tax exemptions. Moreover, many additional public school districts will in the future begin desegregating pursuant to court order or HEW regulations and guidelines, under state law or voluntarily. Additional racially segregated private schools may be organized or expanded, many of which will be operated by organizations which have received, applied for, or will apply for federal tax exemptions. As in the case of those representative organizations and private schools described in paragraphs 39-48, *supra*, such organizations and schools provide, or will provide, white children with a racially segregated alternative to desegregating public schools. By recognizing these organizations as exempt from federal taxation, defendants facilitate their development, operation and expansion and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems. Defendants thereby also interfere with the efforts of federal courts, HEW and local school authorities to eliminate racially dual school systems.

INJURY AND LAWS VIOLATED

50. As a consequence of the grant of federal tax benefits to racially segregated private schools, or the organizations that operate them, which are located in or serve desegregating public school districts, plaintiffs and their class now are suffering and will continue to suffer serious, substantial and irreparable injury for which they have no adequate remedy at law. Specifically, the grant of federal tax exemptions to such schools and organizations in such circumstances injures plaintiffs in that it:

(a) constitutes tangible federal financial aid and other support for racially segregated educational institutions, and

(b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.

51. The grant of federal tax benefits to racially segregated private schools, or to the organizations that operate them, which are located in or serve desegregating public school districts, is unlawful and unconstitutional in that:

(a) such racially segregated private schools are not operated "exclusively for religious, charitable, scientific, testing for public safety, literary, and educational purposes" as required by Section 501(c)(3) of the Internal Revenue Code of 1954 and the lawful regulations promulgated thereunder;

(b) Federal tax benefits constitute a form of tangible federal financial aid and other assistance to racially segregated schools in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d *et seq.*; Section 1 of the Civil Rights Act of 1866, 42 U.S.C. Section 1981; and the Fifth Amendment to the Constitution of the United States; and

(c) Federal tax benefits foster and encourage the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby also interfere, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d *et seq.*; Section 1 of the Civil Rights Act of 1866, 42 U.S.C. Section 1981; and the Fifth and Fourteenth Amendments to the Constitution of the United States, with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court expedite this case in every way feasible and:

(a) Certify, pursuant to Rule 23(c), Federal Rules of Civil Procedures, that this action is maintainable as a class action under Rule 23(b)(2);

(b) Enter a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure, that the acts, policies and practices of defendants in granting federal tax exemptions and benefits to racially segregated private schools, and to the organizations that operate them, which operate in or serve public school districts desegregating pursuant to court order or HEW regulations and guidelines, under state law, or voluntarily, violate Section 501 of the Internal Revenue Code of 1954, Title VI of the Civil Rights Act of 1964, Section 1 of the Civil Rights Act of 1866, and the Fifth and Fourteenth Amendments to the Constitution of the United States;

(c) Enter orders granting (1) preliminary and permanent injunctions restraining defendants from granting federal tax exemptions to, and (2) a permanent injunction restraining defendants from continuing tax exemptions now held by, private schools, or the organizations that operate them, which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either—

(1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;

(2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or

(3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems;

(d) Enter a permanent injunction or an order in the nature of mandamus requiring defendants to revise their regulations regarding applications for tax exemptions by pri-

vate schools [40 Fed. Reg. 53409 (Nov. 18, 1975)] in a manner consistent with paragraph (c) above;

(e) Award plaintiffs the costs of this action, including out-of-pocket expenses and reasonable attorneys' fees, pursuant to Section 718 of the Educational Amendments of 1972, 20 U.S.C. Section 1617; and

(f) Grant plaintiffs such other relief as may be just and proper.

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JULY 30, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS,

v.

WILLIAM SIMON, ET AL., DEFENDANTS.

MOTION FOR CERTIFICATION OF CLASS ACTION

Pursuant to Rule 1-13(b) of the United States District Court for the District of Columbia, plaintiffs respectfully move this Court to enter an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure certifying that this action be maintained as a class action on behalf of the parents of all black children attending public school systems undergoing, or which may in the future undergo, desegregation pursuant to court order or U.S. Department of Health, Education and Welfare regulations and guidelines, under state law, or voluntarily.

In support of this motion, plaintiffs submit that this action meets all the requirements of Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, as is more fully set forth in the attached Memorandum of Points and Authorities in Support of Motion for Certification of Class Action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1426

INEZ WRIGHT, ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

MOTION OF DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT

The defendants, William E. Simon, Secretary of the Treasury, and Donald C. Alexander, Commisioner of Internal Revenue, by their attorneys, respectfully move this Court pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss plaintiffs' complaint. The grounds for this motion are as follows:

(1) Because there is no factual nexus between the private school discrimination which plaintiffs allege in this action and the grant of exemptions to these schools by defendants which plaintiffs challenge, plaintiffs have failed to state a claim. *Moose Lodge #107* v. *Irvis*, 407 U.S. 163 (1972).

(2) Under the decision of the Supreme Court in *Eastern Kentucky Welfare Rights Organization* v. *Simon*, ___ U.S. ___ (1976), 44 U.S. Law Week 4724 (June 1, 1976), plaintiffs lack standing.

(3) There is no jurisdiction for plaintiffs' action.

(4) Plaintiffs' action is barred by the Anti-Injunction Act, 26 U.S.C., Section 7421(a).

(5) Plaintiffs' action is barred by the federal tax exception to the Declaratory Judgment Act, 28 U.S.C., Sections 2201-2202.

(6) Plaintiffs' action is barred by the doctrine of sovereign immunity.

(7) Plaintiffs' action is nonreviewable.

(8) Even apart from their claim with respect to the equal protection doctrine, plaintiffs have failed to state a claim in this action.

Defendants have set forth the above grounds in greater detail in the attached supporting Memorandum, which Memorandum is incorporated herein by reference.

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their constitutional right to send their children to private schools is not remotely related to any injury caused respondents by the manner in which the IRS is enforcing Rev. Proc. 75-50.

Even through the use of prohibited speculation, it is not possible fairly to trace respondents' alleged injuries to any action on the part of the IRS. Because of the apparent "indirectness of injury" and the "speculative inferences" which are necessary to connect respondents' injuries to the actions of the IRS, respondents fail to meet the Article III minimum requirement "that, in fact, the asserted injury was the consequence of the defendants' actions . . . ." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 44-45.[62]

D. Respondents Lack Standing Because It Is Speculative That The Remedy Sought Will Relieve The Harm Alleged.

The prospects are equally "speculative" that respondents would obtain relief from the alleged injury through imposition of the desired remedy. A few points bear repeating. IRS policy prohibits the granting of tax exemp-

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that school is grounded in the Christian faith, and the moral and philosophical principles underlying its pedagogy are designed to instill into its students the faith, belief, values, morals and lifestyle of the Christian faith . . . ." (J.A. 48). This obviously provides a valid, independent reason for the creation or expansion of private schools during the time when public schools were undergoing desegregation. *Cf. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284-87 (1977).

[62] In *Lugo v. Miller*, 640 F.2d 823 (6th Cir. 1981), the Sixth Circuit was presented with a case identical to *Eastern Kentucky*, but hospitals had been joined as defendants and it was alleged they were "financially dependent" upon their tax-exemptions. The court dismissed the case for lack of standing, because plaintiffs still failed to allege "a causal connection between the assumed injury and Rev. Rul. 69-545" and "it still remains no more than conjecture that plaintiffs would receive the medical care they desire." 640 F.2d at 828, 831.

tions to discriminatory private schools. The current guidelines for determining whether a school is discriminatory, Rev. Proc. 75-50, require that each school undertake a number of substantive measures to demonstrate their good faith nondiscriminatory policy. (Interv. Pet. App. E 1e-12e). Most importantly each school is required to respond under penalty of perjury. (*Id.* at 7e-8e). Any IRS review is undertaken on a case-by-case basis. (*See, e.g., id.* at 6e). Respondents seek to require the IRS to replace the current procedure with one incorporating a sweeping presumption of discrimination based upon information furnished by the school which demonstrates that it has failed to attract its requisite quota of minority students [63] and that it was formed at a time when the public schools were undergoing desegregation.

For several reasons, it is speculative whether the remedy sought would relieve the harm alleged. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). First, as the district court commented, there is no indication in the record that the criteria which the IRS ultimately would adopt would, in reality, be any different from those currently employed. (Interv. Pet. App. A 9a). Second, respondents' premise is not that IRS

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[63] In its earlier argument that respondents' desired remedy, incorporating a conclusion of guilt based upon failure to attract a substantial number of minority students, is unlawful, the IRS observed:

> [T]he schools' continued insubstantial minority enrollments could plausibly be accounted for on many grounds other than intent to discriminate. For example, it could be accounted for by reason of an absence of minority applications due to the schools' relatively high tuition; the schools' inability to offer specific programs available in public schools; their inconvenient geographical location; local residential patterns; or the school's being perceived by minorities on subjective grounds as potentially threatening educational environments.

Reply of Defendants to Plaintiffs' Opposition to Defendants' Motion to Dismiss at 12. *Accord*, IRS, Exempt Organizations Examination Guidelines Handbook ¶ 341.11 (1977).

policy condones discrimination, but that racially discriminatory private schools already are committing perjury in order to obtain tax-exempt status. There is nothing in respondents' requested remedy which would prevent such criminal acts. Finally, it is quite likely that respondents' proposed presumption of guilt based upon failure to meet a specified quota is unlawful and, accordingly, unenforceable.[64] The IRS contended that the proposed guidelines were unlawful, until it proposed to adopt them. (*See* Reply Of Defendants To Plaintiffs' Opposition To Defendants' Motion To Dismiss at 10-17).[65] "Hence it is purely speculative whether, in the final analysis, any fewer schools would be granted tax-exemption under

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[64] In attempting to justify the need for such extreme measures, respondents place great reliance on the concession by then Commissioner Kurtz that some schools "continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory." (Tax-Exempt Hearings at 5). Commissioner Kurtz apparently was referring to the schools addressed in the cases of *Norwood v. Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974) and *Brumfield v. Dodd*, 425 F. Supp. 528 (E.D. La. 1977). (*See* Tax-Exempt Hearings at 6). Neither respondents nor Commissioner Kurtz offered an explanation why a new procedure was necessary to revoke the tax-exempt status of private schools adjudicated to be discriminatory, when the current revenue procedure provides for revocation under such circumstances. (*See* Interv. Pet. App. E 9e).

[65] *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Austin Independent School District v. United States*, 429 U.S. 990 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *see also Norwood v. Harrison*, 413 U.S. 455, 471 (1973) ("No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law."); and *Speiser v. Randall*, 357 U.S. 513 (1958), in which a California procedure for denying tax exemptions to members of communist organizations was invalidated, because it placed the burden of proof and persuasion on the taxpayer to show nonengagement in the proscribed activity. The Court asked, "How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements?" 357 U.S. at 526.

plaintiffs' system than under the current IRS system." (Interv. Pet. App. A 9a).

In addition, respondents allege, as did plaintiffs in *Eastern Kentucky*, that the tax-exemptions "encourage" the target schools. It is not alleged, however, that the tax-exemption "encourages" those schools to discriminate, but merely to exist and, thus, to offer an alternative to public education. It is not even remotely suggested that the target schools would cease to exist, or that there would be a "change in the desegregation of a given school district" (Interv. Pet. App. A 9a) should life be made more difficult for the target schools by removal of their tax-exempt status. Thus, the relation between the relief sought and any possible benefit to respondents is even more speculative than in *Eastern Kentucky* and respondents, accordingly, lack standing.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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Nos. 81-757 and 81-970

In the Supreme Court of the United States

OCTOBER TERM, 1983

W. WAYNE ALLEN, PETITIONER

v.

INEZ WRIGHT, ET AL.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

INEZ WRIGHT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether federal courts may entertain equity suits against the Secretary of the Treasury brought by parents of black children in public schools seeking to have the Treasury revise the guidelines and procedures it uses to enforce the prohibition on tax exempt status for racially discriminatory private schools, where they do not allege discrimination or any other distinct injury to themselves or their children by any private school or by the Treasury.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 81-757

W. WAYNE ALLEN, PETITIONER

v.

INEZ WRIGHT, ET AL.

No. 81-970

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

INEZ WRIGHT, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

[1] Roscoe L. Egger, Jr., Commissioner of Internal Revenue, is a petitioner in No. 81-970, in addition to Donald T. Regan, Secretary of the Treasury.

In addition to Inez Wright, who is a party to this proceeding individually and on behalf of her minor children, Oscar Clay Renfro, Anthony Lee Renfro, Lisa Marie Wright, and Ephron Antoni Wright, Jr., of Memphis, Tennessee, the following persons are also respondents: Geneva Walker, individually and on behalf of her minor children, Johnny Ranae Walker and Vincent Calvett Walker, of Memphis, Tennessee; Delores G. Beamon, individually and on behalf of her minor children, Rynthia Beamon, Reuben Beamon, Jr., Cynthia Beamon, and Melvin Beamon, of Montgomery, Alabama; Mary Louise Belser, individually and on behalf of her minor children, Charlotte Belser, Connie Belser, Janice Belser, Lawrence Belser, Marvin Belser, and Anthony Belser, of Montgomery, Alabama; Etherline House, individually and on behalf of her minor children, Elmore House, Roger House, and Zachary House, of Montgomery, Alabama; Lou Ella Jackson, individually and on behalf of her minor children Regina Jackson, Angela Jackson, Phyllis

OPINIONS BELOW

The opinion of the district court (Interv. Pet. App. 1a-15a)[2] is reported at 480 F. Supp. 790. The opinion of

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Jackson, Gregory Jackson, Michele Jackson, Dora Lee Jackson, Lewis Jackson, Jr., and Sandra Jackson, of Montgomery, Alabama; Elsie R. Walker, individually and on behalf of her minor children, Sonja S. Walker and Cornell E. Walker, Jr., of Farmville, Virginia; Anna G. Miller, individually and on behalf of her minor child, Joseph W. Miller, Jr., of Farmville, Virginia; Clydia Koen, individually and on behalf of her minor children, Robbie Koen and Cara Koen, of Cairo, Illinois; Annie L. Johnson, individually and on behalf of her minor child, Howard Johnson, Jr., of Cairo, Illinois; Mable Hollis, individually and on behalf of her minor children, Bernadian Hollis and Frank Hollis, of Cairo, Illinois; Hyland L. Davis, individually and on behalf of his minor children, Damon A. Davis and Troy A. Davis, of Beaufort, South Carolina; Lawrence Washington, individually and on behalf of his minor children, Youland J. Washington and Jerry J. Washington, of Seabrook, South Carolina; Rena M. Robinson, individually and on behalf of her minor children, Angela Christine Robinson and Carol Denise Robinson, of Bowman, South Carolina; Robert C. Zimmerman, individually and on behalf of his minor children, Robert Zimmerman, Jr., Paul Zimmerman, Cynthia Zimmerman and Andrea Zimmerman, of Bowman, South Carolina; Rev. John Wilbur Wright, individually and on behalf of his minor children, Dedra Olether Wright and JohnCalvin McCurnell Wright, of Holly Hill, South Carolina; Lavinia Washington, individually and on behalf of her minor children, Stephen Washington, Gregory Washington, Eliot Washington, and Kevin Washington, of Holly Hill, South Carolina; Robert Jackson, individually and on behalf of his minor child, Robert Jackson, Jr., of Natchitoches, Louisiana; Moses Williams, individually and on behalf of his minor children, Rhonda Rense Williams, Matra Lucille Williams, and Lula Marie Williams, of Tallulah, Louisiana; Fred Bracy and Betty Bracy, on behalf of themselves and on behalf of their minor children, Willie Bracy and Robert Bracy, of Monroe, Louisiana; Alma Lee Griffin and Darnell Griffin, on behalf of themselves and on behalf of their minor children, Gregory Griffin, Carol Dyne Griffin, Verline Ann Griffin, Carmen Griffin, and Terry Griffin, of Monroe, Louisiana; and Herbert H. Jackson, individually and on behalf of his minor children, Carla Cumberlander, Vincent Cumberlander, Francine Cumberlander, and Herbert H. Jackson, Jr., of Roxbury, Massachusetts.

[2] "Interv. Pet." refers to the petition for a writ of certiorari (No. 81-757) filed by intervenor W. Wayne Allen, Chairman of the

the court of appeals (Interv. Pet. App. 1b-58b) is reported at 656 F.2d at 820.

JURISDICTION

The court of appeals entered its judgment on June 18, 1981 (J.A. 9, 67) and denied rehearing on August 26, 1981 (J.A. 9; Interv. Pet. App. 1c, 1d). The Secretary and the Commissioner filed a petition for a writ of certiorari on November 23, 1981 (No. 81-970). This Court granted the petition and consolidated the case with *Allen* v. *Wright, et al.* (No. 81-757) on June 20, 1983 (J.A. 85, 86). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution, Section 501(a) and (c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), Rev. Stat. 1977 (1878 ed.) (42 U.S.C. 1981), and Sections 103 and 615 of the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 562, 577, are set forth at Interv. Pet. 2-4. The relevant provisions of Article III of the Constitution and Section 170(a) and (c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix A to the petition for certiorari in No. 81-970.

Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, the Proposed Revenue Procedure, and the Modified Proposed Revenue Procedure are set forth respectively at Interv. Pet. App. 1e-12e, 1f-13f, and 1g-14g.

STATEMENT

A. Background

In 1970, the Internal Revenue Service adopted the position that a private school will not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954, or as an eligible recipient

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Board of Trustees of the Briarcrest School System, Memphis, Tennessee.

of charitable contributions deductible for income tax purposes under Section 170(c)(2) of the Code, unless it establishes that its admissions and educational programs are operated on a racially nondiscriminatory basis.[3] This position was recently upheld by this Court in *Bob Jones University* v. *United States*, Nos. 81-3 and 81-1 (May 24, 1983). In Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Service defined operation under a racially nondiscriminatory policy to mean that "the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." Under this policy, the Service has revoked the tax exemptions of more than 100 private schools that failed to adopt and publicize a racially nondiscriminatory policy (*Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 252 (1979) (statement of Commissioner Jerome Kurtz)). See, *e.g.*, *Prince Edward School Foundation* v. *Commissioner*, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981).

In 1972 and in 1975, the Internal Revenue Service published guidelines and procedures for determining whether a private school operates in good faith under a racially

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[3] Section 501(c)(3) of the Code lists organizations that are exempt from federal income tax pursuant to Section 501(a). Among these are organizations formed and operated exclusively for religious, charitable, or educational purposes. If an organization is described in Section 501(c)(3), contributions to it are deductible as charitable contributions for purposes of the federal income tax under Section 170(c)(2), and deductible for purposes of the federal estate and gift taxes under, respectively, Section 2055 and 2522. The organization is also exempt from social security taxes on employees by virtue of Sections 3121(b)(8)(B) (FICA) and 3306(c)(8) (FUTA).

nondiscriminatory policy. See Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 (Interv. Pet. App. 1e-12e). Rev. Proc. 75-50, which is currently in effect, provides that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith" (Section 2.02). The Procedure is enforced by means of annual certifications subject to penalty of perjury, reporting and recordkeeping requirements, and public complaints (Interv. Pet. App. 7e-8e, 9e-11e). The Revenue Procedure enumerates requirements that must be met by each school seeking to establish its eligibility for tax exempt status. The district court summarized these requirements as follows (Interv. Pet. App. 8a-9a n.3):

> (1) The schools must formally state their nondiscriminatory policy in their organizational charter or similar instrument (Rev. Proc. 75-50, Sec. 4.01);
>
> (2) The schools must set forth that policy in all brochures, advertisements, catalogues, fund solicitations and similar publications (Sec. 4.03);
>
> (3) The schools must either effectively publish that policy under specified, detailed guidelines in newspapers (Sec. 4.03-1(a)), or broadcast media (Sec. 4.03-1(b)); or, in the alternative, they must be able to demonstrate that they in fact have a significant minority enrollment or have meaningfully sought to recruit such an enrollment (Sec. 4.03-2);
>
> (4) The schools must have a nondiscriminatory policy with respect to faculty, school programs, and tuition and scholarship practices (Secs. 4.04, 4.05);
>
> (5) They must certify all of the above under penalty of perjury (Sec. 4.06);
>
> (6) The schools must provide specified information to [the Service] regarding the racial composition of their faculty and staff, the nondiscriminatory char-

acter of their tuition and scholarship policies, and the policies regarding race discrimination held by their incorporators, founders, board, and donors (Sec. 5.01-1 through 5.01-4, see also Secs. 4.07, 4.08); and

(7) The schools must keep records for three years periods [sic] from the year of compilation, regarding racial composition of faculty and students, nondiscrimination in scholarship and tuition, and as well as retaining copies of all brochures, catalogues, and the like (Sec. 7).[4]

On August 22, 1978 and February 9, 1979, the Internal Revenue Service published proposed Revenue Procedures (Interv. Pet. App. 1f-13f, 1g-14g) that would tighten the requirements for tax exempt status. Under the August 22, 1978 proposal, any private school which had an insignificant number of minority students and which was formed or substantially expanded during a period of desegregation of the public schools in its community (a "reviewable" school) would be presumed racially discriminatory unless the school could demonstrate that it operated in good faith on a nondiscriminatory basis, to be evaluated according to five specified factors.[5] The pro-

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[4] Even schools that meet the test of Rev. Proc. 75-50 can be found ineligible for tax exempt status under Rev. Rul. 71-447 (*Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 253 (1979) (statement of Commissioner Jerome Kurtz)).

[5] The five factors specified were:

1. Availability of and granting of scholarships or other financial assistance on a significant basis to minority students.

2. Active and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified.

3. An increasing percentage of minority student enrollment.

4. Employment of minority teachers or professional staff.

posal prompted a heavy volume of adverse written comments, as well as adverse testimony at public administrative hearings. In response to the public reaction, the Service published for public comment a revised version of the proposed procedure on February 9, 1979. The revised proposal, like the earlier proposal, established additional criteria "reviewable" schools would have to satisfy in order to retain tax exempt status. The revised proposal, however, would have provided "greater flexibility for a school to show that it is operating on a racially nondiscriminatory basis" (Interv. Pet. App. 2g) by permitting it to demonstrate that it had "undertaken actions or programs reasonably designed to attract minority students on a continuing basis" (*id.* at 11g).

In February and March 1979, the Oversight Subcommittee of the House Committee on Ways and Means conducted hearings on the IRS proposals, and received a great deal of adverse testimony. *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979). In the wake of the hearings, the House Committee on Appropriations recommended that

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5. Other substantial evidence of good faith, including evidence of a combination of lesser activities, such as—

(a) Continued and meaningful advertising programs beyond the requirements of Revenue Procedure 75-50, or contacts with minority leaders inviting applications from minority students.

(b) Significant efforts to recruit minority teachers.

(c) Participation with integrated schools in sports, music, and other events or activities.

(d) Making school facilities available to outside, integrated civic or charitable groups.

(e) Special minority-oriented curriculum or orientation programs.

(f) Minority participation in the founding of the school or current minority board members.

(Interv. Pet. App. 9f-10f).

adoption of the Service's proposals be deferred until after the regular tax writing committees of Congress had determined that they represented the proper interpretation of the tax laws (H. R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979)). Congress then proceeded to block implementation of the proposed guidelines through enactment of two related provisions in the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559. In Section 615 (93 Stat. 577), known as the Dornan Amendment, Congress stipulated that none of the funds made available by that Act be used to carry out the proposed Revenue Procedures of 1978 and 1979. In Section 103 (93 Stat. 562), known as the Ashbrook Amendment, Congress provided that none of the funds made available by the Act be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." The district court observed that "[t]he effect of [this congressional] action is to retain in effect, at least until September, 1980, the presently effective Rev. Proc. 75-50 * * *" (Interv. Pet. App. 14a).

The Ashbrook-Dornan Amendments expired on October 1, 1980, but were reinstated for the period December 16, 1980 through September 30, 1981.[6] For fiscal year 1982, after the court of appeals' decision in this case, the House of Representatives adopted a spending restriction that specifically denied funding for carrying out even court orders entered after August 22, 1978.[7] See 127 Cong.

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[6] H.R.J. Res. 644, 96th Cong., 2d Sess. (1980), Pub. L. No. 96-536, Section 101(a)(1) and (4), 94 Stat. 3166, as amended by Supplemental Appropriations and Rescission Act of 1981, Pub. L. No. 97-12, Section 401, 95 Stat. 95.

[7] The House voted to modify the 1980 Ashbrook Amendment by inserting the phrase "court order" in an amendment to the Treas-

Rec. H5392-H5398 (daily ed. July 30, 1981). The Senate Committee on Appropriations subsequently reported out a spending restriction in identical form. Under a joint resolution making continuing appropriations for the 1982 fiscal year, this provision became effective as of October 1, 1981.[8]

These statutory restrictions have now expired, and the Internal Revenue Service is again free to consider appropriate modifications in its enforcement of the prohibition on tax exempt status for discriminatory private schools. Changes, if any, will be instituted through regular administrative procedures and will be subject to congressional oversight. No such changes have yet been proposed or adopted.

B. The Proceedings in this Case

1. Respondents are the parents of black students who attend public schools in seven states. They seek to represent a nationwide class of "several million" parents whose children attend public schools in school districts undergoing desegregation (J.A. 18-23, 43). In 1976, they brought this suit in the United States District Court for the District of Columbia against the Secretary of the Treasury and the Commissioner of Internal Revenue, alleging with reference to Rev. Proc. 75-50 that "regulations" issued by the federal defendants are legally insuf-

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ury, Postal Service, and General Government Appropriations Bill, 1982 (H.R. 4121, 97th Cong., 1st Sess. (1981)). The bill thus provided in § 616:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, *court order*, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978 (emphasis added).

[8] H.R.J. Res. 325, 97th Cong., 1st Sess. (1981), Pub. L. No. 97-51, Section 101(a)(3), 95 Stat. 958; see 127 Cong. Rec. H6698-H6699, H6702 (daily ed. Sept. 30, 1981).

ficient in that they permit schools offering "racially segregated educational opportunities" to receive tax exempt status (J.A. 17-18, 25). Although the complaint asserted that "there are more than 3,500 racially segregated private academies operating in the country having a total enrollment of more than 750,000 children" (J.A. 24), it cited by name only 19 "representative" private schools.[9] Each of these schools is alleged to have "an announced policy of nondiscrimination, and [to have] satisfied defendants in this regard," but, according to the complaint, is "racially segregated" (J.A. 26-38).[10] According to the complaint, the federal officials "have fostered and encouraged the development, operation and expansion of many of these racially segregated private schools by recognizing them as 'charitable' organizations described in Section 501(c)(3) of the Internal Revenue Code" (*id.* at 24).

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[9] The following private schools were identified by name in the complaint: Harding Academy, Briarcrest Baptist School System and the Southern Baptist Schools of Whitehaven, Inc., Memphis, Tennessee; Natchitoches Academy, Natchitoches Parish, Louisiana; Delta Christian Academy and Tallulah Academy, Madison Parish, Louisiana; River Oaks School, Monroe, Louisiana; Holly Hill Academy and Bowman Academy, Orangeburg, South Carolina; Sea Pines Academy, Beaufort County, South Carolina; Prince Edward Academy, Prince Edward County, Virginia; Montgomery Academy and St. James Parish School, Montgomery, Alabama; Camelot Parochial School, Cairo, Illinois; Hyde Park Academy, South Boston Heights Academy and Parkway Academy, Boston, Massachusetts (J.A. 26-38). The complaint referred, in addition, to "thousands of other racially segregated independent private schools which operate in or serve desegregating public school districts and which have received, applied for, or will apply for tax exemptions" (*id.* at 32-33).

[10] Respondents apparently used the term "racially segregated" with reference to private schools in their complaint to signify only that there were few or no black students in attendance at a school, and not to signify that the absence of more black students was the result of racially exclusionary practices. At a hearing in the district court, counsel for respondents conceded that he did not know whether any of the black children who are parties to this action would be denied admission to any private school on the basis of race (J.A. 62-63).

To establish their standing to sue, respondents included an allegation of injury in their complaint. It states, in full (J.A. 38-39):

> As a consequence of the grant of federal tax benefits to racially segregated private schools, or the organizations that operate them, which are located in or serve desegregating public school districts, plaintiffs and their class now are suffering and will continue to suffer serious, substantial and irreparable injury for which they have no adequate remedy at law. Specifically, the grant of federal tax exemptions to such schools and organizations in such circumstances injures plaintiffs in that it:
>
> (a) constitutes tangible federal financial aid and other support for racially segregated educational institutions, and
>
> (b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.

Respondents did not allege that they or their children had applied to, been discouraged from applying to, or been denied admission to any private school or schools.[11] Nor did they allege that denial of tax exempt status would cause any private school or schools to close down, decrease in enrollment, or change their practices.[12] They conceded that their children now attend desegregated schools (J.A.

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[11] As the court of appeals noted, "Plaintiffs * * * maintain they have no interest whatever in enrolling their children in a private school" (Interv. Pet. App. 13b).

[12] As the court of appeals noted, "Plaintiffs * * * claim indifference as to the course private schools would take" (Interv. Pet. App. 18b).

62). They did not allege that their own tax liability is affected by the conduct or policies they challenge.

Respondents requested a declaratory judgment that "the acts, policies and practices of defendants in granting federal tax exemptions and benefits to racially segregated private schools * * * violate Section 501 of the Internal Revenue Code of 1954, Title VI of the Civil Rights Act of 1964, Section 1 of the Civil Rights Act of 1866, and the Fifth and Fourteenth Amendments to the Constitution of the United States" (J.A. 40). In addition, they sought a permanent injunction requiring the federal officials to revoke, or to deny, tax exemptions for all private schools (or for the organizations that operate the schools), "which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either (J.A. 40)—

(1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;

(2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or

(3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public schools.

Respondents further requested the court to grant injunctive relief in the nature of mandamus requiring the federal officials to revise Rev. Proc. 75-50 to provide that recognition of exempt status for all such schools and organizations would be revoked or denied (J.A. 40-41).

The Secretary and the Commissioner filed a motion to dismiss the complaint on the grounds that respondents lacked standing to sue; that they failed to state a claim; that the subject matter of their suit was nonreviewable; and that the action was barred by the Anti-Injunction Act (26 U.S.C. (Supp. V) 7421(a)), the tax limitation in the Declaratory Judgment Act (28 U.S.C. (Supp. V)

2201), and the doctrine of sovereign immunity (J.A. 45-46). The district court granted leave to intervene and to file a motion to dismiss to W. Wayne Allen, Chairman of the Board of the Briarcrest School, Memphis, Tennessee, one of the private schools named in respondents' complaint (*id.* at 26-27, 47-50, 54-57).

2. The district court dismissed the suit on three grounds (J.A. 64, 65; Interv. Pet. App. 3a).[13] First, the court ruled that respondents had no standing to assert their claims because (a) they failed to assert a distinct, palpable, and concrete injury, (b) they had not shown that any injury they alleged was fairly traceable to the actions of the federal officials, (c) it was speculative whether the relief requested would remedy the injury, and (d) there was not a sufficient degree of concrete adverseness between respondents and the federal officials (Interv. Pet. App. 4a-11a).

In so ruling, the court relied on *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). The court noted that there was no allegation that any of the private schools cited in the complaint actually were discriminating in violation of the Constitution or of federal law, or that any of respondents or their children had suffered any discriminatory treatment or exclusion (Interv. Pet. App. 4a-6a). The court considered it to be speculative whether enforcement of respondents' proposed guidelines would cause any school permanently to lose a tax exemption that it would have retained under existing Internal Revenue Service procedures (*id.* at 8a-10a). Furthermore, even if implementation of respondents' proposed enforcement procedures might serve to deprive

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[13] In a related action confined solely to private schools in the State of Mississippi, *Green* v. *Regan* (Civ. Action No. 1355-69 (D.D.C. May 17, 1977)), which was consolidated with the instant case in the district court, the district court denied the government's motion to dismiss (J.A. 53), finding that the *Green* plaintiffs "have a right to proceed to determine whether or not * * * there has been good-faith compliance with the Order of this Court" (J.A. 52). See also Interv. Pet. App. 3a n.1.

some schools of exemptions that they could not later recover, the court regarded it as equally speculative whether a loss of exemptions would produce a change in the desegregation of any given school district. Instead, it appeared to the court probable that many schools had only a limited dependence on tax exemptions and, if forced to choose, would forgo tax-exempt status rather than abandon their practices. The court accordingly concluded that respondents had failed to show a sufficient causal nexus between the injury alleged and the challenged procedures (*id.* at 6a-10a).

Second, the district court ruled that respondents' action was "barred by the doctrine of nonreviewability" because it "would require this Court to undertake detailed or continuing review of a generalized IRS enforcement program, or to review complex issues of tax enforcement policy and of agency resource allocation" (Interv. Pet. App. 11a). As the court saw the matter, such review "would be tantamount to this Court becoming a 'shadow commissioner of Internal Revenue' to run the administration of tax assessments to private schools in the United States" (*id.* at 12a).

Finally, the court concluded that the enactment in 1979 of the Ashbrook and Dornan Amendments to the Treasury Appropriations Act expressed "the Congressional intent that Section 501(c)(3) of the Internal Revenue Code [was] not susceptible of the construction which [respondents] would place upon it in this case" (*id.* at 14a-15a). While the court acknowledged that the Ashbrook and Dornan Amendments (as applied in fiscal years 1980 and 1981) apparently allowed a federal court to fashion a remedy, it concluded that "in such an area ripe [sic] with legislative history and government regulation, it is not the business of a federal court to explicitly thwart the will of Congress or to otherwise fail to carry it out" (*id.* at 15a).[14]

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[14] The district court found it unnecessary to consider the other grounds urged in support of the motion to dismiss, viz., absence

3. A divided panel of the court of appeals reversed the judgment and remanded the case for further proceedings (J.A. 67). The court ruled that respondents had standing to maintain their action (Interv. Pet. App. 12b-25b). In so ruling, the court recognized that *Simon* v. *Eastern Ky. Welfare Rights Organization*, *supra*, "suggests that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges" (Interv. Pet. App. 16b). It recognized also that certain of its own previous decisions had dismissed for lack of standing suits brought by persons who sought to litigate the tax liability of others (*id.* at 17b, n.24).[15]

But the court of appeals concluded that other decisions of this Court point in an "opposite direction[]" (Interv. Pet. App. at 16b). See *Coit* v. *Green*, 404 U.S. 997 (1971), aff'g *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). In the court's view, those cases "recognized the right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination" (Interv. Pet. App. 24b-25b). The court ruled that "[i]n view of the centrality of that right in our contemporary (post-Civil War) constitutional order, we are unable to conclude that *Eastern Kentucky* speaks to the issue before us" (*ibid.*).

In addition, the court found no impediment to the action in the doctrine of non-reviewability (Interv. Pet.

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of illegal state action, ban of the Anti-Injunction and Declaratory Judgment Acts, sovereign immunity, and failure to join indispensable parties. The court of appeals remanded on those issues (Interv. Pet. App. 3b n.2), and we will not address them in this brief.

[15] See *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). See also *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978).

App. 32b-35b). The court concluded that respondents' claims derive from constitutional concerns that courts, not administrators, are better equipped to address (*id.* at 32b-33b n.53). In the court's view, if respondents were to prevail on the merits of their claims, relief would not entail "large scale judicial intervention in the administrative process" (*id.* at 35b). Nor did the court consider the Ashbrook and Dornan amendments to be an obstacle to fashioning a remedy (*id.* at 25b-32b). Those amendments, as the court construed them, were merely temporary checks on Internal Revenue Service initiatives and did not purport to control judicial dispositions (*id.* at 29b-30b).[16]

In dissent, Judge Tamm would have held that respondents had no standing to sue (Interv. Pet. App. 38b-58b). He found that they failed to allege a distinct and palpable injury to themselves, or a sufficient nexus between the Internal Revenue Service's actions and whatever injury they claimed to have suffered. In his view, the majority of the court erroneously interpreted *Green*, *Norwood*, and *Gilmore* "as requiring it to abandon long-established standing principles, principles limiting the exercise of judicial power to the redress of *actual injury*" (Interv. Pet. App. 38b; emphasis in original). The majority's opinion, he concluded, was "the product of an impermissible shift in focus from the right of these plaintiffs to make their challenge to the rights they wish to assert" (*id.* at 57b).

On August 26, 1981, the court denied the government's motion for en banc consideration, three judges dissenting (Interv. Pet. App. 1d).[17]

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[16] The court of appeals' decision was rendered before the Ashbrook Amendment was amended expressly to encompass court orders. See note 7, *supra*.

[17] Thereafter, on motion of respondents (J.A. 68-78), the court of appeals issued orders on February 18, 1982, and on March 24, 1982 (Tamm, J., dissenting), enjoining the Secretary and the Commissioner from granting Section 501(c)(3) status to any school that unlawfully discriminates on the basis of race (J.A. 81-84).

SUMMARY OF ARGUMENT

I. Respondents seek judicial revision of Internal Revenue Service guidelines and procedures that have been the subject of intense public comment and congressional oversight over the last decade. Alleging no injury to themselves at the hands of the private schools whose tax exemptions they challenge, and no injury at the hands of the government defendants other than their disapproval of government practices, respondents stand as mere disappointed observers of the governmental process. The judgment below holding that they have standing to maintain this action is in direct conflict with this Court's decision in *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), and with other decisions establishing the limitations on the jurisdiction of an Article III court.

II. Respondents alleged two injuries stemming from the government's method of enforcing the restrictions on tax exemptions for discriminatory private schools. Neither allegation satisfies this Court's requirements for establishing standing to sue.

A. The first allegation of injury—that the government's action "constitutes tangible federal financial aid and other support for racially segregated educational institutions" (J.A. 38)—amounts to no more than "assertion of a right to a particular kind of government conduct," which this Court has held to be an insufficient basis for standing under Article III (*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 483 (1982)). Respondents simply have not alleged any "distinct or palpable" injury to themselves (see *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)).

B. The second allegation of injury—that the government's "encourage[ment]" of segregated private schools "interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school dis-

tricts" (J.A. 39)—shares the deficiency of the first, and is also too speculative to support standing, since a change in Internal Revenue Service guidelines and procedures might or might not result in a decrease in availability of segregated private schools to white children fleeing desegregating public schools. Indeed, respondents have not even alleged that the relief they seek would produce such a result. Their position, therefore, has all the shortcomings, and more, of the plaintiffs' position in *Eastern Kentucky, supra.*

III. An examination of the means by which Congress intended the federal tax system to operate suggests that no person who is not himself seeking a tax benefit has standing to challenge the Internal Revenue Service's treatment of the tax liabilities of others. See *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); *Louisiana* v *McAdoo*, 234 U.S. 627 (1914); *Eastern Kentucky, supra*, 426 U.S. at 46 (Justice Stewart, concurring). Opening the courts to generalized grievances concerning enforcement of the tax laws would lead to extensive interference in the administrative process, intended to be left to the supervision of the President and Congress.

IV. The court of appeals erred in concluding that this Court's decisions in *Coit* v. *Green*, 404 U.S. 997 (1971), *Norwood* v. *Harrison*, 413 U.S. 455 (1973), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), are at odds with *Eastern Kentucky* and the other rulings of this Court on the doctrine of standing. Although *Gilmore* addresses standing in but a footnote and *Norwood* not at all, it is clear that the plaintiffs in those cases had standing on the traditional basis of protecting rights they were entitled to under earlier judicial decrees (see *Gilmore, supra*, 417 U.S. at 570 n.10). *Coit* v. *Green*, a summary affirmance, did not constitute a ruling by this Court on the issue of standing, and was later held by this Court to "lack[] the precedential weight of a * * * truly adversary controversy" (*Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974)).

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE TREASURY GUIDELINES AND PROCEDURES THAT HAVE BEEN SUBJECT TO EXECUTIVE AND LEGISLATIVE REVIEW AND RESULT IN NO CONCRETE INJURY TO THEM

Respondents, who are parents of black public school children suing on behalf of themselves and their children and on behalf of all other parents of black students attending public schools in districts undergoing desegregation, have brought this suit to require the Secretary of the Treasury and the Commissioner of Internal Revenue to revise Internal Revenue Service guidelines and procedures implementing the prohibition on tax exempt treatment for educational institutions that engage in racially discriminatory practices, under Sections 170(c)(2) and 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). Respondents' complaint challenges not the propriety of the Internal Revenue Service's substantive policy against tax exempt status for discriminatory schools, which was upheld by this Court last Term in *Bob Jones University* v. *United States*, Nos. 81-3 and 81-1 (May 24, 1983), but the effectiveness of the measures by which that policy is enforced. As the court of appeals expressed it, "plaintiffs complain * * * that some schools 'are slipping through the Commissioner's net of enforcement' " (Interv. Pet. App. 22b n.27).

Respondents allege [18] that current Internal Revenue Service guidelines and procedures regarding applications for tax exempt status by private schools are "legally insufficient" because "many private schools with insubstantial or nonexistent minority enrollments which were organized or expanded at or about the time public school

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[18] For purposes of evaluating the correctness of the district court's dismissal of respondents' action, the allegations in their complaint will be accepted as true. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 115 (1979).

districts in which they are located or which they serve were desegregating, have retained their federal tax exemptions merely by adopting and certifying—but not implementing—the required policy of nondiscrimination" (J.A. 25).[19] Respondents do not challenge the tax exempt status of any particular schools, although their complaint lists 19 "representative" tax exempt private schools that they allege to be "racially segregated" (J.A. 26-38). Respondents admittedly have *not* alleged that they have been excluded or otherwise discriminated against by these or any other tax exempt private schools; nor do they allege that revocation of the schools' tax exempt status would cause the schools to close down or to alter their practices. As the court of appeals noted, respondents "claim indifference as to the course private schools would take" (Interv. Pet. App. 18b).

Respondents have asked the courts to require the Service to adopt new guidelines and procedures which would deny or revoke any tax exemptions of schools with "insubstantial or nonexistent minority enrollments" in districts where public schools are undergoing desegregation, under any of three conditions: (1) if they "were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating"; (2) if they "have been determined in adversary judicial or administrative proceedings to be racially segregated"; or (3) if they "cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance at desegregating public school systems" (J.A. 40).

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[19] This is not, properly speaking, a challenge to Rev. Proc. 75-50, which expressly requires that, to be tax exempt, "[a] school must show affirmatively, * * * that since the adoption of [a racially nondiscriminatory policy] it has operated as a bona fide manner in accordance therewith" (Interv. Pet. App. 1e). Respondents apparently do not believe Rev. Proc. 75-50 is being enforced, though they allege no specific instance in which a tax exempt school has failed to implement its nondiscriminatory policy.

Respondents' proposed policy is similar to proposals published for public comment by the Internal Revenue Service on August 22, 1978 (Interv. Pet. App. 1f-13f) and February 9, 1979 (*id.* at 1g-14g).[20] These proposals were greeted with a barrage of more than 100,000 adverse written comments (*id.* at 11a). Congress conducted hearings on the proposals, at which it heard additional criticism. Following the hearings, the House Appropriations Committee formally recommended that the Service defer adoption of the proposals until after the regular tax writing committees could determine whether they properly interpreted the tax laws (H.R. Rep. No. 96-248, 96th Cong.,

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[20] The Internal Revenue Service proposals and respondents' proposals all are based on a presumption that private schools with few or no minority students formed or expanded in times of public school desegregation in their communities are in violation of the public policy underlying Sections 170(c)(2) and 501(c)(3). On the basis of this common element—characterized by the district court as a "presumed-guilty-until-proven-innocent approach" (Interv. Pet. App. 14a, quoting Second Supp. Mem. of Intervenor in Support of Motion to Dismiss at 4)—the district court concluded that congressional repudiation of the Internal Revenue Service proposals "is the strongest possible expression of the Congressional intent that Section 501(c)(3) of the Internal Revenue Code is not susceptible of the construction which plaintiffs would place upon it in this case" (Interv. Pet. App. 14a-15a).

The principal difference between respondents' somewhat vague proposal and the published proposals is in the nature of the showing that a school must make once the presumption of ineligibility has attached. The Internal Revenue Service proposals focus on affirmative outreach efforts to attract minority students (see Interv. Pet. App. 9f-10f (August 22, 1978 proposal); *id.* at 11g (February 9, 1979 proposal)), while respondents' proposal focuses on whether the school has been established or expanded during desegregation or can be said to provide "racially segregated educational opportunities" for white children avoiding desegregation in public schools (J.A. 40). It is not clear that schools with open admissions policies, even with affirmative outreach efforts, would be able to make respondents' requested showing; indeed, the schools' tax exempt status would depend on factors essentially outside their control. By way of contrast, Rev. Proc. 75-50 focuses on whether a school has adopted, announced, and implemented a "racially nondiscriminatory policy" (Interv. Pet. App. 1e).

1st Sess. 14-15 (1979)). By vote of both houses, Congress then barred implementation of the proposed guidelines through amendments to the Treasury's appropriations.[21] These statutory restrictions have now expired, but until further proceedings take place, again subject to congressional oversight, Rev. Proc. 75-50 remains in effect.

Respondents thus are in the posture of disappointed observers of the governmental process. Proposals substantially similar to theirs have been formally proposed but, as a result of the mixed considerations that govern the fate of agency proposals subject to public comment and congressional oversight, have not been adopted. The question naturally arises whether these individuals' preference for alternative enforcement procedures under Section 501(c)(3) presents a justiciable controversy.

Under the holdings of this Court, a plaintiff must " 'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The doctrine of standing has both constitutional and prudential aspects, recently summarized by this Court in *Valley Forge Christian College* v. *Americans United For Separation of Church And State, Inc.*, 454 U.S. 464, 471-476 (1982). As an "irreducible minimum," Article III requires two showings: (1) actual injury that (2) is traceable to the alleged illegal conduct of the defendant and is likely to be redressed by a favorable decision. These requirements ensure that the court can resolve the legal issues presented "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" (*id.* at 472). They also reflect a "[p]roper regard for the complex nature of our constitutional structure [, which] requires neither

[21] These developments in Congress are described in more detail (pages 7-9, *supra*).

that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury" (*id.* at 474).

In addition to these constitutional requirements, this Court has also recognized prudential limitations on the ability of litigants to assert their claims in court. These limitations were summarized in *Warth* v. *Seldin*, *supra*, 422 U.S. at 499: "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the case rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Particularly pertinent to this case is the admonition against permitting litigants to raise "abstract questions of wide public significance," (*id.* at 500) which are "pervasively shared and most appropriately addressed in the representative branches" (*Valley Forge College*, *supra*, 454 U.S. at 474-475). Under both constitutional and prudential standards, respondents' generalized allegations of injury fall short.

In *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), this Court faced a situation in many ways identical to this. There, as here, members of the public turned to the courts for reversal of Internal Revenue Service rulings governing the grant of Section 501 (c) (3) status to certain institutions, in that instance hospitals. This Court held that the plaintiffs lacked standing to sue, even though they alleged an actual injury—a denial of service—by the institutions whose tax exemptions they were challenging. On its face, respondents' complaint appears to provide even *less* basis for standing than there was in *Eastern Kentucky*. Respondents freely admit that they do not desire admission to the educational institutions whose tax exempt status they question (Br. in Opp. to Cert. at 8). It should follow, a fortiori, that they lack standing to bring this lawsuit. So the district court held.

Nonetheless, the court of appeals found that "*Eastern Kentucky* is not the line appropriately followed in the matter before us" (Interv. Pet. App. 18b), and reversed the district court's dismissal of respondents' complaint. It is therefore appropriate to consider in detail the allegations of injury in respondents' complaint, and set them against the principles this Court has established for determining whether litigants have standing to sue.

II. RESPONDENTS' ALLEGATIONS OF INJURY ESTABLISH NO DIRECT AND CONCRETE INJURY CAUSED BY THE GOVERNMENT'S ACTIONS AND REDRESSIBLE BY THE COURTS

A. Respondents' Allegation That The Government Provides Tangible Aid To Racially Segregated Institutions Establishes No "Injury In Fact," But Only A Generalized Grievance With Government Conduct

Respondents' first allegation of injury is that the grant of federal tax exempt status to racially segregated private schools in districts undergoing desegregation injures them in that it "constitutes tangible federal financial aid and other support for racially segregated educational institutions" (J.A. 38). On its face, this allegation fails to draw any connection between the allegedly wrongful action and respondents' own interests. In the course of the hearing below on the motions to dismiss, the district court sought clarification from counsel as to the nature of the injuries asserted by respondents. Counsel for respondents answered: "Their injury, Your Honor, is an infringement of their Constitutional right to be free of governmental support of private school discrimination * * *" (J.A. 62). As expressed by respondents' brief in opposition to certiorari, "[P]laintiffs here have standing to seek an end to government aid to private discrimination because such government aid in and of itself injures them" (Br. in Opp. at 9).[22]

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[22] Even these explanations may overstate respondents' actual allegations, which concern "schools which have insubstantial or

An allegation that third parties, who themselves have not injured respondents, are improperly receiving tax benefits does not identify a "distinct and palpable injury" to respondents sufficient to justify judicial relief (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). This Court has never equated mere dissatisfaction over government conduct with the "injury in fact" necessary to sustain Article III jurisdiction. This Court's formulations to describe the requisite injury have been consistent and unambiguous: the plaintiff must have been "concretely affected" (*Blum* v. *Yaretsky*, No. 80-1952 (June 25, 1982), slip op. 7); the injury must be "distinct and palpable" (*Warth* v. *Seldin*, *supra*, 422 U.S. at 501); "abstract injury is not enough" (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)); a plaintiff "must allege that he has been or will in fact be perceptibly harmed" (*United States* v. *SCRAP*, 412 U.S. 669, 688 (1973)). The injury need not, of course, be economic (*id.* at 686; *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972)); aesthetic and environmental interests, for example, may support standing (*SCRAP*, *supra*, 412 U.S. at 686). On the other hand, as stated in *Valley Forge College* (454 U.S. at 482-483), "This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law * * *'" (quoting *Baker* v. *Carr*, *supra*, 369 U.S. at 208, quoting *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922)). It is not enough that litigants may be correct on the merits, or that they are intensely interested or experienced in the problem (*Sierra Club* v. *Morton*, *supra*, 405 U.S. at 727). The courts are not authorized to review legislative or executive decisions "at the behest of organi-

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nonexistent minority enrollments and which are located in or serve desegregating public school districts" (J.A. 26). As the district court observed, there is no allegation that the schools whose tax exemptions respondents question "are actually discriminating in violation of the Constitution or federal law" (Interv. Pet. App. 5a-6a). Nor would respondents' requested relief be confined to schools that discriminate (J.A. 40-41).

zations or individuals who seek to do no more than vindicate their own value preferences through the judicial process" (*id.* at 740). See also *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968).

Respondents in this case feel aggrieved because they do not believe the government is doing an adequate job of enforcing the laws; but as this Court has made clear, litigants have no legally cognizable right "to have the Government act in accordance with their views of the Constitution [or statutory requirements] * * *. * * * [A]ssertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Article III without draining those requirements of meaning" (*Valley Forge College, supra*, 454 U.S. at 483; see also *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972)).

The court of appeals stressed the "denigration" respondents suffer "as black parents and school children when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth" (Interv. Pet. App. 13b; see also *id.* at 34b). But this Court has rejected the notion that "psychological" discomfiture at government action, even if "phrased in constitutional terms," establishes a basis for standing (*Valley Forge College, supra*, 454 U.S. at 485-486). Were it otherwise, any would-be litigant could defeat the Article III limitations merely by alleging what cannot be disproved: that he suffers "denigration," "stigma," or other forms of psychological distress as a result of the challenged action.

With respect to their first allegation of injury, respondents have a claim no stronger than that of other litigants who have been held to lack standing in cases before this Court. In *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), plaintiffs sued to challenge the eligibility of members of Congress under the Incompatibility Clause, Art. I, § 6, Cl.2, to serve as reservists in the military. Characterizing their interest as one of hav-

ing their government "act in conformity" with the Constitution (418 U.S. at 217), this Court held that the plaintiffs lacked standing to sue. See also *Ex parte Levitt*, 302 U.S. 633 (1937) (rejecting plaintiff's standing to challenge constitutionality of the appointment and confirmation of a Justice of this Court under the Ineligibility Clause, Art. I, § 6, Cl.2); *United States* v. *Richardson*, 418 U.S. 166 (1974) (rejecting taxpayer's standing to challenge the alleged failure of the Central Intelligence Agency to comply with the Accounts Clause, Art. I, § 9, Cl. 7). Also closely analogous to this case is *Valley Forge College*, *supra*, in which plaintiffs challenged a transfer of federal property to a religious institution as a violation of the Establishment Clause.[23] They claimed a "shared individuated right to a government that 'shall make no law respecting the establishment of religion'" (454 U.S. at 482). The court rejected their claim of standing, however, stating: "They fail to identify any personal injury suffered by the plaintiffs *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms" (*id.* at 485-486; emphasis in original).

Respondents' allegation that the government is not adequately enforcing the Internal Revenue Code and the Constitution, and that in consequence private discrimination is encouraged, is nothing more than a claim of their "shared individuated right" to a government that adequately enforces the limits on tax exemptions to discriminatory schools. This is indistinguishable from allegations of government failure to comply with the Incompatibility

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[23] Indeed, a conclusion that respondents lack standing in this case would not raise the special problems associated with restrictions on litigation under the Establishment Clause. See *Valley Forge College*, *supra*, 454 U.S. at 500-505, 507-510 (Brennan, J., dissenting); *id.* at 515 (Stevens, J., dissenting).

Clause, the Accounts Clause, the Ineligibility Clause, the Establishment Clause, or any other constitutional or statutory provision by persons not directly injured.[24] "[A] right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Article III without draining those requirements of meaning" (*Valley Forge College, supra*, 454 U.S. at 483).

Respondents' standing cannot be justified, in the absence of actual injury, on the basis of the "issues [they] wish[] to have adjudicated" (*Flast* v. *Cohen, supra*, 392 U.S. at 99). The "right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination," as identified by the court of appeals (Interv. Pet. App. 24b-25b),

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[24] Respondents apparently believe that the rights they assert are not "undifferentiated right[s] common to all members of the public" because the Fourteenth Amendment is intended "to safeguard an identifiable segment of the citizenry: blacks, the same class to which respondents belong" (Br. in Opp. at 10 n.10). There are three flaws in this argument. First, respondents do not allege that they have in fact been discriminated against by the private schools in question; at best they seek to protect the rights of fellow members of their race who might be (cf. *Warth* v. *Seldin, supra*, 422 U.S. at 514). But injuries, like rights, pertain to individuals and not to classes or races (cf. *Connecticut* v. *Teal*, 457 U.S. 440, 453-456 (1982)). The fact that members of their race are specially protected from injury by the Fourteenth Amendment does not accord *these* respondents standing if they have not been injured (*Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166 (1972)). Second, respondents are simply wrong if they assert that the benefits of equal protection—even of desegregated schooling—belong not to all citizens alike, but only to members of one race (see *Washington* v. *Seattle School District No. 1*, No. 81-9 (June 30, 1982), slip op. 14; *Milliken* v. *Bradley*, 418 U.S. 717, 793 (1974) (Marshall, J., dissenting)). Finally, the claims petitioners assert derive from the *tax code*, with its policy of granting exemptions only to charitable organizations whose activities benefit the community (*Bob Jones University* v. *United States, supra*, slip op. 11-15). Respondents have no greater standing than any other members of the public to seek improved enforcement of this policy through the courts.

is indeed a fundamental concern of government (*Bob Jones University* v. *United States*, *supra*, slip op. 17-20, 29), but "the centrality of that right in our contemporary (post-Civil War) constitutional order" (Interv. Pet. App. 25b) does not create "injury in fact" where in fact there is no injury.

The fundamental character of the constitutional or statutory provisions under which a plaintiff seeks to sue is irrelevant to whether he has established standing (*Valley Forge College*, *supra*, 454 U.S. at 484). Thus in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, and in *United States* v. *Richardson*, *supra*, citizen claims to standing were rejected even though the constitutional guarantees the plaintiffs sought to put in issue were of manifest importance to the nation. Only recently, in *Valley Forge College*, *supra*, the plaintiffs contended that their "personal" right to a government that did not establish religion was more worthy of standing than "the generalized interest of all citizens in constitutional governance" asserted in *Schlesinger* and *Richardson*. This Court observed, in words that apply to this case with equal force (454 U.S. at 484):

> Nor can *Schlesinger* and *Richardson* be distinguished on the ground that the Incompatibility and Accounts Clauses are in some way less "fundamental" than the Establishment Clause. Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution. To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the "importance" of the claim on the merits increases, we reject that notion. * * * [W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States.

See also *Flast* v. *Cohen*, *supra*, 392 U.S. at 129 n.18 (Harlan, J., dissenting).

Indeed, this Court has rejected claims of standing based on interests similar to those of respondents. In *O'Shea* v. *Littleton*, *supra*, plaintiffs brought suit to challenge "a pattern and practice of intentional racial discrimination" by government officials (414 U.S. at 491); yet, lacking actual or threatened injury, they were held to have no standing to sue. Similarly, in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), this Court denied standing to a black plaintiff to challenge the State's grant of a liquor license to a private club with a discriminatory membership policy, where he did not allege that he had applied for and been denied membership. Respondents' right in this case to be free of "government aid to private discrimination" (Br. in Opp. at 9) no more sustains standing than did the *O'Shea* plaintiffs' right to be free from the government's "pattern and practice of intentional racial discrimination" or the *Moose Lodge* plaintiff's right to challenge government licensing of discriminatory establishments. See also *Warth* v. *Seldin*, *supra* (plaintiffs had no standing to challenge the "intentional exclusionary practices" of a municipal zoning board, though they claimed, among other things, that these practices deprived them "of the benefits of living in a racially and ethnically integrated community" (422 U.S. at 502, 512)); *Valley Forge College*, *supra* (rejecting the hypothetical example of standing based simply on the "personal right to a government that does not deny equal protection of the laws" (454 U.S. at 489 n.26). See also *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978).[25]

We submit that respondents' first allegation of injury is insufficient to support standing to bring this action.

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[25] The court below appears to have adopted the position taken by Justice Douglas, dissenting in *Moose Lodge*, but consistently rejected by this Court. Justice Douglas concluded that, since "American culture and history have been so plagued with racism and discrimination," the mere "brand" upon black citizens of discriminatory practices constitutes "injury in fact," whether or not they themselves suffered the discrimination (407 U.S. at 184 n.4).

B. Respondents' Allegation That Government Encouragement Of Racially Segregated Educational Opportunities Interferes With Public School Desegregation Does Not Establish An Injury Fairly Traceable To Government Action And Redressible In Court

Respondents' second allegation of injury likewise fails to establish a basis for standing under Article III. Respondents allege that the grant of federal tax exemptions to racially segregated private schools located in or serving public school districts undergoing desegregation, "fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems" (J.A. 39). Like respondents' first allegation of injury, this statement fails to spell out any connection between the wrong allegedly perpetrated by the government and an injury to respondents. However, respondents have made clear that they represent school children attending public schools in districts undergoing desegregation, and it might be inferred that their alleged injury stems from the effect of the tax benefits on their opportunity to attend desegregated public schools.

But respondents do not allege that the government enforcement policies they complain of have in fact resulted in a denial of their opportunity to attend desegregated public schools. In fact, counsel for respondents conceded in the district court that respondents' children presently attend desegregated schools even under current Internal Revenue Service procedures (J.A. 62).[26] They have,

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[26] In contrast, the individual plaintiffs in *Eastern Kentucky*, who described themselves as subsisting below the poverty line and suf-

therefore, alleged no " 'threatened or actual injury resulting from the putatively illegal action' " (*Warth* v. *Seldin*, *supra*, 422 U.S. at 499, quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973)). Their second allegation of injury thus suffers all the deficiencies of the first.

Moreover, respondents fail to allege that any interference with their opportunity to attend desegregated public schools "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" (*Valley Forge College*, *supra*, 454 U.S. at 472, quoting *Eastern Kentucky*, *supra*, 426 U.S. at 36, 41). This deficiency is independently fatal to their claim. Respondents do not allege that the tax exemptions in fact increase enrollment in segregated private schools and thus siphon white students away from the public schools. Nor do they allege that adoption of revised Internal Revenue Service procedures would decrease enrollment in the private schools in question, or cause them to change their practices. Indeed, respondents "claim indifference as to the course private schools would take" if their tax exemptions were lifted (Interv. Pet. App. 18b). Without such allegations there can be no causal link between the challenged conduct and the alleged injury, and no basis for supposing that a favorable decision would bring redress.

Under this Court's decision in *Eastern Kentucky*, any allegation that respondents' proposed change in Internal Revenue Service enforcement policies would cause private schools to welcome black students or to lose enrollment would be too speculative to support a claim of standing. In *Eastern Kentucky*, the plaintiffs sued to

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fering from medical conditions requiring hospitalization, each alleged a specific occasion on which they or a family member sought and were denied service by particular hospitals, because of their indigency (426 U.S. at 32-33).

enjoin the Treasury to withdraw a revenue ruling (Rev. Rul. 69-545, 1969-2 Cum. Bull. 117), which held that a non-profit hospital could qualify for recognition as a "charitable organization" under Sections 501(c)(3) and 170(c)(2) even though it provided no more than emergency room service to persons who could not pay for hospitalization, and to require the Treasury to reinstate its earlier position (Rev. Rul. 56-185, 1956-1 Cum. Bull. 202), which held that a hospital could not qualify unless it was operated to the extent of its financial ability for the benefit of those not able to pay. Plaintiffs alleged that in extending the benefits of tax exempt status to hospitals not providing care other than emergency room service to indigents, the government was "encouraging" the hospitals to deny medical services to the plaintiffs, in contravention of the Internal Revenue Code, the Administrative Procedure Act, and the Constitution.

This Court held that the plaintiffs in *Eastern Kentucky* had no standing to sue. The Court recognized that the plaintiffs had an interest in obtaining access to hospital services and that some of the plaintiffs had sustained an injury to that interest at the hands of the hospitals. But the Court considered injury at the hands of the hospitals, which were not defendants, to be insufficient by itself to establish a case or controversy with the Treasury. The Court found it "purely speculative whether the denials of service specified in the complaint fairly can be traced to [defendants'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43).[27] Moreover, the Court found it "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to [plaintiffs] of such services" (*id.* at

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[27] The Court observed that where, as here, the alleged injury is indirect, it tends to be " 'substantially more difficult' " for the plaintiff to establish that his injury results from the defendant's actions or that judicial relief could redress it (426 U.S. at 44-45, quoting *Warth* v. *Seldin*, *supra*, 422 U.S. at 505).

43). To the Court it seemed "just as plausible that the hospitals * * * would elect to forego favorable tax treatment" (*ibid.*). The Court thus held that the plaintiffs had failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm' " (*id.* at 44-45, quoting *Warth* v. *Seldin*, *supra*, 422 U.S. at 505). See also *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-264 (1977).

Respondents' second allegation of injury is no less "speculative" than the plaintiffs' claim in *Eastern Kentucky*. As the district court held (Interv. Pet. App. 9a-10a):

> [I]t is purely speculative that loss of these exemptions would produce any net change in the desegregation of a given school district (the second injury asserted by plaintiffs). It is by no means clear that these schools would not elect to forego the exemption in question rather than end any discriminatory conduct. It appears probable that many such schools have only limited dependence on these exemptions, indeed, even assuming substantial dependence, the schools might well choose to compensate by alternate means for financial benefits otherwise available from the exemptions. Clearly, under law firmly established by *Eastern Kentucky*, *supra*, plaintiffs lack standing because there is a sufficient degree of speculativeness that the relief requested will remedy the injury claimed by plaintiffs.

Indeed, respondents' claim here is decidedly *more* speculative even than that in *Eastern Kentucky*. In order to affect the racial composition of the public schools respondents' children attend, the relief requested against the Treasury would have to influence not only the decisions of the private schools directly involved, but also the decisions of scores of individual parents on where to send their children to school. Only if significant numbers of white parents respond to whatever decisions the private

schools may make by returning their children to public school would the desegregation of respondents' schooling be enhanced. This additional link in the causal chain, depending as it does on the varied motivations and reactions of persons subject neither to court order nor to Treasury procedures, multiplies the uncertainties that led this Court to reject the claim in *Eastern Kentucky*.[28]

Neither respondents nor the court of appeals have disputed the district court's conclusion that respondents' claim is too speculative to support standing under the precedent of *Eastern Kentucky*.[29] Respondents merely argue, and the court of appeals agreed, "that *Eastern Kentucky* is the wrong frame for their case" (Interv. Pet. App. 18b). The reason *Eastern Kentucky* is considered the "wrong frame" apparently is that respondents and the court of appeals have chosen to rely not upon the allegation of interference with a right to attend desegregated public schools, but upon the first allegation—of the right to be free from government support for private discrimination.[30] We have already shown that that allegation does not provide a sufficient basis for standing.

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[28] The district court also found it "purely speculative whether, in the final analysis, any fewer schools would be granted tax exemptions under plaintiffs' system than under the current IRS system" (Interv. Pet. App. 9a). In this respect, as well, respondents here have a weaker claim for standing than did the plaintiffs in *Eastern Kentucky*.

[29] The court of appeals acknowledged: "Plaintiffs do not dispute that it is 'speculative,' within the *Eastern Kentucky* frame, whether any private school would welcome blacks in order to retain tax exemption or would relinquish exemption to retain current practices" (Interv. Pet. App. 18b; footnotes deleted).

[30] The court of appeals stated: "The very act by the IRS of according tax exemption to a school that discriminates in their vicinity causes immediate injury to them, plaintiffs maintain, *and that is the only injury for which they seek redress*" (Interv. Pet. App. 14b; emphasis added).

III. UNDER THE PRUDENTIAL TESTS FOR STANDING ESTABLISHED BY THIS COURT, NO PERSON NOT SEEKING A TAX BENEFIT MAY CHALLENGE THE TAX TREATMENT OF OTHERS

We have demonstrated that the allegations of injury in respondents' complaint do not establish existence of a " 'distinct and palpable injury' * * * that is likely to be redressed if the requested relief is granted" (*Gladstone, Realtors, supra*, 441 U.S. at 100, quoting *Warth* v. *Seldin, supra*, 422 U.S. at 501). It is possible, however, to generalize: No person who is not himself seeking a tax benefit has standing to challenge the Treasury's treatment of the tax liabilities of others. Any claim that a person is injured by private conduct induced or encouraged by considerations of tax treatment will be too "speculative" for the reasons discussed in *Eastern Kentucky*, while any claim of "taxpayer standing" by virtue of a supposed increase in one's tax liabilities as a result of the tax benefits afforded to another will be rejected for the reasons set out in *Valley Forge College* and *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). As Justice Stewart said in *Eastern Kentucky*, "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else" (426 U.S. at 46) (concurring opinion).

The same conclusion may be reached under this Court's rulings on the prudential aspects of standing, where the question must be posed: "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (*Warth* v. *Seldin, supra*, 422 U.S. at 500).[31] Thus, even if respondents could allege a concrete injury (as in *Eastern Kentucky*), and even if

[31] Professor David Currie has described this statement as "the soundest sentence the Supreme Court has uttered on this troublesome subject within human memory" (Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42).

they could (contrary to *Eastern Kentucky*) persuade a court to accept their "attenuated line of causation" from Treasury policy, through the independent decisions of schools and parents, to their alleged injury (see *United States* v. *SCRAP*, *supra*, 412 U.S. at 688), their standing would still be questionable because there is no provision, either of constitutional or of statutory law, that can be understood as granting them a right to litigate the tax liabilities of other persons.[32]

This is not to say that the Internal Revenue Service's administration of the tax laws is never subject to judicial reexamination.[33] Not only may taxpayers obtain review of decisions directly bearing upon their own tax liability (*e.g.*, *Bob Jones University* v. *United States*, *supra*), but they may also challenge the tax treatment of others where it is relevant to their own claim for consistent treatment (*e.g.*, *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983) (organization that was denied tax exempt status because of substantial lobbying activity challenged, under Equal Protection Clause, the right of veterans' organizations to tax exempt status notwithstanding those organizations' substantial lobbying); see also *United States* v. *Maryland Savings-Share Insurance Co.*, 400 U.S. 4 (1970)). But suits by persons whose own tax liability is not affected "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom" (*Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (1914)).

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[32] The district court's conclusion that Internal Revenue Service guidelines and procedures are "nonreviewable" (Interv. Pet. App. 11a-13a), draws upon these same considerations. Because the legality of the Service's guidelines, procedures, and other interpretations of law are judically reviewable at the behest of an aggrieved person seeking a tax benefit, however, the point is better understood as one of standing than of nonreviewability.

[33] But cf. *Valley Forge College*, *supra*, 454 U.S. at 489 (the "assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing" (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 227)).

This Court has noted that "it is * * * open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen" (*United States* v. *Richardson*, *supra*, 418 U.S. at 178 n.11). Important though it is to each citizen that the government fairly, conscientiously, and efficiently enforce the laws, citizens have never been recognized as having standing to challenge such enforcement in court, as it applies to others. For example, this Court has held that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" (*Linda R.S.* v. *Richard D.*, *supra*, 410 U.S. at 619). Thus, in *Linda R.S.*, the plaintiff was denied standing to challenge the constitutionality of a state criminal statute limiting mandatory child support to legitimate children, even though she might receive a clear economic benefit if the requirement were enforced on behalf of illegitimate children as well.[34]

The principle against third-party interference with the government's enforcement policies is especially compelling in the "unique context of a challenge to a criminal statute" (410 U.S. at 617), where the intrusive and coercive power of the state is at its height. It is applicable as well to other areas of law enforcement where would-be plaintiffs alleging no injury may seek to have the courts act as "virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). As this Court has observed, "[S]uch a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action" (*ibid.*).[35] The principle is particularly

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[34] Cf. *Orr.* v. *Orr*, 440 U.S. 268 (1979) (husband has standing to challenge state marital law granting alimony rights only to female former spouses).

[35] Some courts have entertained suits challenging the "abdication" of an agency's duty to comply with specific statutory enforce-

applicable to the administration of the tax laws, where the twin elements of coercive authority and complex administrative considerations are evident. As Justice Brennan has stated, "Courts must be circumspect in dealing with the taxing power in order to avoid unnecessary intrusion into the functions of the legislative and executive branches" (*Valley Forge College*, *supra*, 454 U.S. at 499 (dissenting opinion)). See also *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979); *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967); *Louisiana* v. *McAdoo*, *supra*.

Congress has delegated "the administration and enforcement of" the tax laws to the Secretary and the Commissioner (26 U.S.C. 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" the tax laws (26 U.S.C. 7805(a)). It has created a Joint Committee on Taxation to investigate the administration, operations and effects of the tax system (26 U.S.C. 8001-8023). Congress has also established precisely defined channels for the adjudication of tax disputes—by proceedings in the Tax Court (26 U.S.C. (& Supp. V) 6212, 6213), by refund or collection actions in the district courts or the Claims Court (26 U.S.C. (& Supp. V) 6532, 7402, 7405, 7422; 28 U.S.C. (& Supp. V) 1346, 1491), or—most directly to the point—by expressly limited declaratory judgment actions, *e.g.*, by an organization seeking recognition as a tax exempt organization under Section 501(c)(3) (26 U.S.C. (& Supp. V) 7428). Otherwise, Congress has prohibited "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining the assessment or collection of any tax" (26 U.S.C. (Supp. V) 7421(a), the Anti-Injunction Act), and has barred declaratory relief in all

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ment procedures (*e.g.*, *Adams* v. *Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Here, the Congress has left enforcement procedures under Sections 170(a) and 501(c)(3) to the discretion of the Commissioner and the Secretary, subject to its own oversight.

actions "with respect to Federal taxes" (28 U.S.C. (Supp. V) 2201, the Declaratory Judgment Act).[36] See, *e.g.*, *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962); *Flora* v. *United States*, 362 U.S. 145 (1960).[37] These provisions reflect a deliberate judgment that, in the tax area, the right to invoke the judicial power must be closely circumscribed. Congress has shown no intention to create a right to challenge the vigor of the government's enforcement of the tax code.[38]

Thus, the district court properly refused to become "a 'shadow commissioner of Internal Revenue' to run the administration of tax assessments to private schools in the United States" (Interv. Pet. App. 12a). Contrary to the view of the court of appeals (Interv. Pet. App. 35b), the relief respondents seek necessarily would entail extensive interference in the process of tax administration.[39]

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[36] The only relevant exception to the prohibition of declaratory relief "with respect to federal taxes" is the provision permitting an organization to seek recognition as a tax exempt organization under 26 U.S.C. (& Supp. V) 501(c)(3) (26 U.S.C. (& Supp. V) 7428). See also 26 U.S.C. (& Supp. V) 7476, 7477, and 7478.

[37] Whether respondents' action would be statutorily barred under these provisions was not decided by the courts below, and will be subject to litigation on remand should this Court conclude respondents have standing.

[38] The prudential component of standing can be understood as an inquiry into legislative or constitutional intent to make a particular grievance judicially cognizable. As Justice Brennan has suggested, to adjudge standing requires "determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court" (*Valley Forge College*, *supra*, 454 U.S. at 492 (dissenting opinion)). Thus, Congress has the power—within the limits of Article III—to make judicially cognizable a claim that otherwise would be barred by the prudential limits on standing. *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 100. Here, the total absence of any provision for third party challenges to the tax treatment of others demonstrates the nonjusticiability of respondents' claim under the prudential standard.

[39] The court of appeals believed that "cases of this nature, ultimately raising non-frivolous constitutional objections to IRS action,

Respondents do not challenge specific exemptions of specific schools. Rather, they seek revisions of the guidelines

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are 'few and far between'; they do not threaten large interference by 'public interest' litigants with the administrative process of collecting taxes" (Interv. Pet. App. 32b n.52). The number of "public interest" actions by nontaxpayers against the Treasury has in fact been quite substantial, however, and the threat that they pose to the expeditious collection of taxes should not be underestimated. See, *e.g.*, *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974) (Anti-Injunction Act barred suit by Quaker organization to enjoin enforcement of withholding tax on its employees); *Lugo* v. *Miller*, 640 F.2d 823 (6th Cir. 1981) (indigent plaintiffs held to lack standing to obtain revocation of Rev. Rul. 69-545 and to compel revocation of hospitals' tax exemptions); *Junior Chamber of Commerce* v. *United States Jaycees*, 495 F.2d 883 (10th Cir.), cert. denied, 419 U.S. 1026 (1974) (sovereign immunity barred suit to compel revocation of organization's tax exemption on ground that it excluded women from membership); *Cattle Feeders Tax Committee* v. *Shultz*, 504 F.2d 462 (10th Cir. 1974) (Anti-Injunction Act barred suit to enjoin enforcement of Revenue Ruling relating to deductibility of prepaid cattle feed); *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (travel agencies lacked standing to compel revocation of exempt status of other organizations operating travel programs); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978) (organization lacked standing to seek revocation of rulings relating to the foreign tax credit allowed international oil companies); *Educo, Inc.* v. *Alexander*, 557 F.2d 617 (7th Cir. 1977) (Anti-Injunction Act and Declaratory Judgment Act barred suit by organization for review of Revenue Ruling relating to status of educational benefit plan for corporate employees); *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980) (Anti-Injunction Act and Declaratory Judgment Act barred suit by marketers of investment annuities for review of Revenue Ruling holding that purchasers of such annuities did not qualify for favorable tax treatment); *Abortion Rights Mobilization, Inc.* v. *Regan*, 552 F. Supp. 364 (S.D. N.Y. 1982) (abortion rights advocates held to have standing to challenge exemptions of religious organizations alleged to engage in efforts to change abortion laws); *Common Cause* v. *Connally*, Civ. No. 1337-71 (D.D.C.) (suit to enjoin enforcement of Treasury Regulations relating to depreciation guidelines dismissed as moot by agreement).

and procedures used by the Treasury to determine the tax status of thousands of private schools (see J.A. 22-24, 40-41).[40] To adjudicate their claims, a broad-scale inquiry into the enforcement practices of the Internal Revenue Service, as well as into the policies and practices of the schools in question, would be required. As the district court observed, "[i]n order to assess the viability of IRS * * * enforcement efforts, this Court would be required to analyze results from a significant number of schools. Even if, as plaintiffs contend, the Court need examine only a 'representative number' of schools to gauge compliance, the effort would be unfathomable" (Interv. Pet. App. 12a). Such a judicial undertaking cannot be required, or justified, on behalf of litigants whose own tax liability would be unaffected by the guidelines and procedures they seek to revise.

This is not to suggest, of course, that the Secretary and the Commissioner are unaccountable in regard to the adoption or enforcement of administrative guidelines and procedures. The role respondents would have the court assume, "as virtually continuing monitors of the wisdom and soundness of Executive action," *Laird* v. *Tatum*, *supra*, 408 U.S. at 15, belongs to Congress, which has the power and duty to oversee the operation, administration, and effects of the internal revenue system (see Sections 8021 through 8023 of the Code), and to the President, who, along with the Treasury officials, is required to "take Care that the Laws be faithfully executed" (Art. II, § 3). Absent an assertion of concrete and remediable injury directly attributable to unlawful government action, the judiciary should not assume the "amorphous [task of] general supervision of the operations of government * * *" (*United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); *Schlesinger*

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[40] The Internal Revenue Service advises that there are approximately 20,000 private schools in the United States currently recognized as, or claiming to be, tax-exempt under Section 501(c)(3).

v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 217-218).

The questions of revenue enforcement policy raised by respondents' suit are properly a matter for public debate. By that means, the views of interested persons and organizations may be ventilated and taken into account. As described (pages 6-9, *supra*), such a debate has occurred: the Executive branch has proposed procedures similar to those advocated by respondents; the public has responded at public hearings and with more than 100,000 written comments; congressional committees have conducted hearings and expressed their views; the "power of the purse" has been used to block proposals unacceptable to Congress. See *Bob Jones University* v. *United States*, *supra*, slip op. 24-27. Respondents simply are dissatisfied with the outcome of the debate. Nontaxpayer suits of this type thus present a classic example of cases raising "questions of broad social import where no individual rights would be vindicated * * *" (*Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 99-100). Nontaxpayer litigants are not permitted under the decisions of this Court "to oversee the conduct of the National Government by means of lawsuits in federal courts" (*United States* v. *Richardson*, *supra*, 418 U.S. at 179; see *id.* at 188-192 (Powell, J., concurring)). Thus, even apart from the specific deficiencies in respondents' complaint, respondents do not have a judicially cognizable right, as third parties whose own tax liability is unaffected, to litigate the adequacy of Treasury's enforcement procedures under Sections 170(a) and 501(c)(3) of the Code.

IV. THE COURT OF APPEALS' HOLDING IS NOT SUPPORTED BY THIS COURT'S JUDGMENTS IN *NORWOOD, GILMORE,* OR *GREEN*

The court of appeals made no attempt to explain or distinguish this Court's rulings addressing the standing doctrine. Rather, the court purported to identify "two divergent lines of Supreme Court decision" and then "select * * * the one we believe best fits the case before

us" (Interv. Pet. App. 16b). The court frankly recognized that respondents' claim would be insufficient under the precedent of *Eastern Kentucky*. But "[i]n view of the centrality of [the right asserted by respondents] in our contemporary (post-Civil War) constitutional order," the court professed itself "unable to conclude that *Eastern Kentucky* speaks to the issue before us" (*id.* at 25b).

Eastern Kentucky cannot be distinguished, however, on the ground that the substantive issues the plaintiffs sought to raise in that case lacked the "centrality" of the issue respondents would litigate here. As discussed above (*supra* pages 28-29), the requirements of standing do not depend on the merits or nature of the underlying issue tendered by a plaintiff; nor are they a matter of choice or discretion with the court. "To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases," this Court has "reject[ed] that notion" (*Valley Forge College*, *supra*, 454 U.S. at 484). In any event, this Court has rejected claims of standing based on precisely the same fundamental right asserted here—the right to be free from governmental assistance to or approval of private racial discrimination. See *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 163.

Moreover, contrary to the court of appeals, the relevant decisions of this Court are not "divergent" (Interv. Pet. App. 16b), and do not "point[] in opposite directions" (*id.* at 15b-16b). Rather than adhering to this Court's teaching on standing, the court of appeals turned to three decisions, two of which did not even address the issue of standing: *Coit* v. *Green*, 404 U.S. 997 (1971); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). None of those decisions warrants, much less requires, the court's holding that respondents have standing.

In *Norwood* v. *Harrison*, *supra*, this Court struck down a program administered by the State of Mississippi under which students in private schools were permitted to bor-

row textbooks from the State without regard to the racially discriminatory policies of the students' schools. The complaint, brought by parents of students who attended public schools in Tunica County, Mississippi, alleged that specified private schools whose students participated in the school textbook program excluded black students on the basis of race (413 U.S. at 457, 467 n.9). See *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss. 1970), aff'd, 440 F.2d 337 (5th Cir. 1971). The district court, in ruling that the textbook program was constitutional, sustained the plaintiffs' standing in one sentence (*Norwood* v. *Harrison*, 340 F. Supp. 1003, 1007 (N.D. Miss. 1972)), and, as the court of appeals here pointed out, "the issue [of standing] was not pursued on appeal" (Interv. Pet. App. 24b). This Court reversed on the merits. As the Court later explained in *Gilmore* v. *City of Montgomery*, *supra*, 417 U.S. at 570-571 n.10: "The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered." Thus, plaintiffs' standing in *Norwood* was by virtue of their position as successful litigants in a related desegregation suit; their injury was the State's interference with their rights under the decree.

Similarly, *Gilmore* v. *City of Montgomery*, *supra*, was an outgrowth of an earlier proceeding where there was no question of the plaintiffs' standing. A decree secured by the *Gilmore* plaintiffs in that earlier proceeding struck down a city ordinance relegating blacks to separate parks and recreational facilities, and mandated the desegregation of those facilities. Plaintiffs' complaint for supplemental relief was entertained to determine whether the city's policy of allocating recreational facilities to segregated private schools had the effect of creating " 'enclaves of segregation' " that denied the plaintiffs equal access to the city's parks and recreational facilities, and thereby impaired the efficacy of the prior decree (417 U.S. at 566-568). This Court's discussion of the standing of those

plaintiffs—its only observation upon standing in the cases relied on by the court of appeals—shows that the rules of standing are not relaxed to accommodate claims of unlawful government aid to racial discrimination. While the Court affirmed the district court's order directing the city not to permit such schools to have "exclusive" use of a city recreational facility, the Court was "not prepared at this juncture and on this record, to assume the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups" (*id.* at 570 n.10).[41] As the Court explained (*id.* at 570-571 n.10; emphasis added):

> The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered. Here, the plaintiffs were parties to an action desegregating the city parks and recreational facilities. Without a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. *The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.*

Thus, in the foregoing cases, as elsewhere, the Court adhered to "the basic principle that to invoke judicial power the claimant must have 'a personal stake in the outcome,' * * *, or 'a particular, concrete injury' or 'a direct injury,' * * * in short, something more than 'generalized grievances' * * *" (*United States* v. *Richardson*, *supra*, 418 U.S. at 179-180; citations omitted).

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[41] The offense supporting standing in *Gilmore* was not, as the court of appeals implied (Interv. Pet. App. 21b), government aid to segregated schools, but rather governmental exclusion of black persons from public parks and recreational facilities. That is why non-exclusive use by segregated schools might not "result in cognizable injury" to the plaintiffs (417 U.S. at 570-571 n.10).

The final decision relied upon by the court of appeals was this Court's summary affirmance without opinion in *Coit* v. *Green, supra.* Although similar to this case on its facts,[42] *Green* cannot be understood as establishing a precedent on the issue of standing. The *Green* plaintiffs' standing was not addressed in the district court opinion affirmed by this Court. See *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971).[43] In this Court, the plaintiffs' standing was addressed only by an intervenor, in an ambiguous initial question in his Jurisdictional Statement.[44] The issue was not addressed in the body of the intervenor's brief, nor in the Motions to Dismiss or Affirm filed by the plaintiffs and the government. See Jurisdictional Statement, Motion to Dismiss, and Motion to Dismiss or Affirm, in *Coit* v. *Green* (No. 71-425, 1971 Term). In these circumstances, this Court can hardly be thought to have ruled on the standing issue. "[T]he precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions' " (*Illinois State Board of Elections* v. *Social-*

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[42] In *Green*, however, at the time it entered a preliminary injunction the district court found that the plaintiffs faced the immediate prospect of losing their right to a desegregated education (309 F. Supp. at 1138-1139). Here, respondents' children concededly are attending desegregated schools (J.A. 62).

[43] The plaintiffs' standing had been addressed by the district court on motion for preliminary injunction. See *Green* v. *Kennedy*, 309 F. Supp. 1127, 1132 (D.D.C.), appeal dismissed *sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970).

[44] The intervenor's statement of questions presented includes whether plaintiffs had "constitutional standing" to bring the action (J.S. 11). The only other reference to "standing" in his brief appears in his discussion of whether the district court judgment rested on *constitutional* rather than statutory grounds—an issue relevant to the intervenor's right to take a direct appeal to this Court under 28 U.S.C. 1253 (J.S. 5). This was the issue contested by the plaintiff (Mot. to Dis. or Aff. 8-11). It is probable, therefore, that the intervenor's question regarding plaintiffs' "constitutional standing" refers to the issue of appellate jurisdiction under Section 1253, and not to Article III standing.

ist Workers Party, 440 U.S. 173, 182 (1979), quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977)). This Court's summary affirmance in *Green*, therefore, should "not * * * be read as a renunciation * * * of doctrines previously announced in our opinions after full argument" (*Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring)), nor should it be considered a reason for declining to follow *Eastern Kentucky*, *Valley Forge College*, and other later opinions of this Court explicating the doctrine of standing.

A second, independent reason not to treat this Court's affirmance of *Green* as a basis for finding standing in this case is that in *Green*, the government and the plaintiffs were in agreement; the appeal was taken by an intervenor whose own standing was seriously in doubt. For this reason, as this Court later stated, "the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974)).[45]

It is evident, therefore, that the *Norwood*, *Gilmore*, and *Green* decisions do not justify the court of appeals' departure from *Eastern Kentucky* and the other standing decisions of this Court.

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[45] The court of appeals, though acknowledging this Court's characterization of *Green* in *Bob Jones University* v. *Simon*, *supra* (Interv. Pet. App. 23b n.29), took the opposite view that *Green* was "[a] sharp[ly] adversary contest" (*id.* at 5b).

CONCLUSION

The judgment of the court of appeals should be reversed and the injunctive order of the court of appeals should be vacated.

Respectfully submitted.

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Respondent's Brief

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Nos. 81-757 and 81-970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

W. WAYNE ALLEN,

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DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Petitioners,

v.

INEZ WRIGHT, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Are black children who attend public schools in desegregating districts injured, within the meaning of Article III, by the federal government's grant of tangible financial aid (tax exemptions and tax-deductibility of contributions) to racially discriminatory private schools created or expanded at the time of public school desegregation in their communities?

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IN THE

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INEZ WRIGHT, *et al.*

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BRIEF FOR THE RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Respondents are parents of black children attending public schools in desegregating school districts in seven states throughout the country. They brought suit in the United States District Court for the District of Columbia seeking to enjoin the federal petitioners (the Secretary of the Treasury and the Commissioner of Internal Revenue) from providing federal support—in the form of income tax exemptions and the consequent deductibility

of contributions in computing taxable income—to racially discriminatory private schools formed or expanded at the time of public school desegregation.

Respondents' suit is a companion to *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), an action by the parents of black public schoolchildren in Mississippi, in which the federal petitioners were enjoined from granting or continuing tax-exempt status to Mississippi private schools that discriminate on the basis of race.

BACKGROUND

The events giving rise to this action commenced much earlier than the Internal Revenue Service's 1970 adoption of the policy that it would withhold tax-exempt status from private schools which practiced racial discrimination, the first background fact to which the federal petitioners advert. (Fed. Pet. Br. at 3-4) This case is directly related to this Court's unanimous ruling in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) that racially segregated schooling denies black children's personal Fourteenth Amendment rights to enjoy equal educational opportunities; and to the companion ruling in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), which gives black children protection from federally supported segregated schooling:

—For more than 15 years after *Brown* and *Bolling*, the federal petitioners continued to permit private schools that discriminate on the basis of race to enjoy tax-exempt status.[1] *See Bob Jones University* v. *United States*, 103 S. Ct. 2017, 2021 (1983).

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[1] Under Section 501(c)(3) of the Internal Revenue Code, organizations "organized and operated exclusively for * * * charitable * * * or educational purposes" are exempt from federal income taxation under Section 501(a) of the Code. Once the schools are classified as tax-exempt under Section 501(a), contributions made to them are deductible from gross income on individual and corporate income tax returns under Section 170 of the Code.

—This policy of the federal petitioners was contrary to this Court's consistent recognition that government aid to racially segregated schools "through any arrangement, management, funds or property" denies black children the equal protection of the laws. *Cooper* v. *Aaron*, 358 U.S. 1, 4 (1958), construing *Brown*. *See Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964) (black schoolchildren are injured by government financial support for purportedly "private" segregated schools).

—The Revenue Service's 1970 decision to withhold tax-exempt status from discriminatory private schools came only after a three-judge court in *Green* entered a preliminary injunction against the federal petitioners, holding that:

> "The Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported." *Green* v. *Kennedy*, 309 F. Supp. 1127, 1137 (D.D.C.), *appeal dismissed sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970).

In its subsequent decision on the merits, the three-judge court in *Green* "concluded that the plaintiffs were entitled * * * to a declaration that the [Internal Revenue] Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools." *Green* v. *Connally*, 330 F. Supp. at 1156. The court therefore permanently enjoined the federal

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Organizations recognized under Section 501(c)(3) are also exempt from federal social security taxes (FICA) pursuant to Section 3121(b)(8)(B) of the Code, 26 U.S.C. § 3121(b)(8)(B) (1976), and from federal unemployment taxes (FUTA) pursuant to Section 3306(c)(8) of the Code, 26 U.S.C. § 3306(c)(8) (1976).

petitioners from approving any application for tax-exempt status for any private school in Mississippi unless the school made certain specific showings that it was in fact nondiscriminatory. *Id.* at 1179-80. That ruling was affirmed by this Court *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971).[2]

THE PRESENT PROCEEDINGS

Five years later, on July 22, 1976, the plaintiffs in *Green* found it necessary to reopen the case to obtain an order enforcing the prior judgment and granting further relief because the federal petitioners had continued to award tax-exempt status to discriminatory schools in Mississippi. The *Green* plaintiffs showed that, despite the court's earlier order, certain Mississippi private schools still enjoyed federal tax-exempt status, even though those schools were specifically held to be racially discriminatory (and therefore ineligible for state-loaned textbooks) in *Norwood* v. *Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974), *on remand from* 413 U.S. 455 (1973).[3] One week

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[2] After the permanent injunction issued in *Green*, the IRS adopted guidelines and procedures for reviewing applications for tax-exempt status from private schools. The IRS procedures, now codified in Rev. Proc. 75-50 (Interv. Pet. App. 1e-12e), generally follow the outline of the requirements ordered in 1971 for Mississippi schools by the court in *Green*. In January 1982 the government announced its intent to return to a policy of issuing the exemptions to discriminatory schools, *see infra* pp. 25-26.

[3] By order and permanent injunction dated May 5, 1980, as clarified on June 2, 1980, the district court in the *Green* case strengthened the permanent decree. The court permanently enjoined the federal petitioners from granting or continuing tax-exempt status to Mississippi schools, or the organizations operating them, which (i) have been determined in adversary or administrative proceedings to be racially discriminatory or (ii) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in ad-

after the plaintiffs in *Green* filed their motion for enforcement and further relief, the respondents filed the Complaint in this case (then called *Wright* v. *Simon*). (J.A. 15-42) They sought the same relief, in their communities, as the plaintiffs in *Green* sought for children in Mississippi. The district court consolidated the present case with *Green*. (J.A. 2-3)

As in *Green*, the plaintiffs (respondents here) are parents of black schoolchildren in desegregating public school districts who sued on their own behalf and on behalf of their children: [4]

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missions, employment, scholarships, loan programs, athletics, and extra-curricular programs.

The court held that these conditions raise an inference of present discrimination which a school may "overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such [a school's all-white or virtually all-white enrollment and staff] is not proximately caused by such school's policies and practices." Injunction, *Green* v. *Regan*, D.D.C. No. 1355-69 (May 5, 1980).

[4] The term "desegregating public school districts" refers to those public school districts which were once segregated and which are in the process of being desegregated pursuant to court order, under federal regulations or guidelines, under state law, or voluntarily. *See* Complaint, ¶ 1. (J.A. 17) Petitioners argue that respondents' children are attending "desegregated" schools, citing out of context a statement made in oral argument and attempting to make it override the whole thrust of the Complaint. Fed. Pet. Brief at 47 n.42; Interv. Pet. Brief at 3 & n.3. The schools attended by respondents' children are desegregated in the sense that they are once-segregated schools that are in the process of desegregating. However, the history has been, as the Court is well aware, that the achievement of unitary status often comes only after a long process of litigation, negotiation, and, in some cases, reopened litigation. *See, e.g., Brown* v. *Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979). In any event, the IRS certainly is no more free to grant tax-exempt status to racially discriminatory private schools in districts that have achieved unitary status than in districts which have not. *See Norwood* v. *Harrison*, 413 U.S. 455, 468 (1973) ("That the State's public schools are now fully unitary, as the District Court found, is irrelevant.").

- Respondents Inez Wright and Geneva Walker alleged that they have children who attend public school in Memphis, Tennessee. (J.A. 19-20) As a result of litigation commenced in 1960, the Memphis City Schools were required to desegregate pursuant to a series of court decisions from 1971 through 1973. (J.A. 26) Since the filing of the Complaint in this case, the federal district court ruled in the course of that public school desegregation litigation that the public school board has an obligation to avoid support for segregated private schools, including the Briarcrest School System, the intervenor here, which was cited in respondents' Complaint as an example of a discriminatory private school which enjoys tax-exempt status. *See infra* pp. 15-16.

- Respondents Delores G. Beamon, Mary Louise Belser, Etherline House and Lou Ella Jackson alleged that they have children who attend public schools in Montgomery, Alabama. (J.A. 20) Pursuant to a federal court order entered in a suit originally filed in 1964, the Montgomery public schools began mandatory desegregation in September 1970. (J.A. 30) Further desegregation measures were required by a 1974 court order. The district court in *Gilmore* v. *City of Montgomery*, 337 F. Supp. 22 (M.D. Ala. 1972), *rev'd in part*, 473 F.2d 832 (5th Cir. 1973), *aff'd*, 417 U.S. 556 (1974) concluded that Montgomery was constitutionally prohibited from affording exclusive use of recreational facilities to segregated private schools—including the Montgomery Academy which respondents allege is improperly tax exempt—because the aid provided "significantly affects the Montgomery public school system." 337 F. Supp. at 24-25. (J.A. 30)

- Respondents Mable Hollis, Annie L. Johnson and Clydia Koen alleged that they have children who attend Cairo, Illinois public schools. (J.A. 21) The Cairo public schools were required to desegregate in September 1967, after the Department of

Health, Education and Welfare (HEW) found the system was racially segregated in violation of Title VI. (J.A. 31) Later reports of the U.S. Commission on Civil Rights, however, describe the role of segregated private schools in undercutting the Cairo public school system's desegregation efforts.[5]

- Respondents Hyland L. Davis and Lawrence Washington alleged that their children attend public schools in Beaufort County, South Carolina. (J.A. 21) In 1969, following several months of negotiations, HEW concluded that it could not obtain voluntary compliance with Title VI and commenced formal enforcement proceedings against the Beaufort County School District. (J.A. 28) Following a hearing in 1970, an initial decision of noncompliance with Title VI was issued against the County by HEW. (J.A. 28) In 1973, the County agreed to a student assignment plan.[6] (J.A. 28)

- Respondents Rena M. Robinson, Robert C. Zimmerman, Rev. John Wilbur Wright, and Lavinia Washington alleged that they have children who attend public schools in Orangeburg, South Carolina. (J.A. 21) In 1967, a school desegregation plan for District 2, where respondents Robinson and Zimmerman live, was approved by HEW. (J.A. 36) In District 3, where respondents Wright and Washington live, a court order was entered in 1970 and HEW accepted District 3's assurance that a school desegregation plan would be implemented. (J.A. 28)

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[5] *See* U.S. Commission on Civil Rights, *Cairo, Illinois: A Symbol of Racial Polarization* 19 (1973); U.S. Commission on Civil Rights, *Cairo, Illinois: Racism at Floodtide* 37-38 (1978).

[6] In the case of Beaufort County, and all of the remaining communities referred to in the Complaint, the Complaint identifies segregated, tax-exempt private schools serving the community which were formed or expanded at the time of public school desegregation.

- Respondent Robert Jackson alleged that his son attends public school in Natchitoches Parish, Louisiana. (J.A. 22) Pursuant to court order, the Natchitoches Parish schools began desegregation in September 1969. (J.A. 27)

- Respondent Moses Williams alleged that he has children who attend public schools in Madison Parish, Louisiana. (J.A. 22) Pursuant to court order, the Madison Parish schools were required to desegregate in September 1969. (J.A. 33) In *Brumfield* v. *Dodd*, 405 F. Supp. 338, 346 (E.D. La. 1975), the court found that certain named segregated private schools, which respondents here allege to be improperly tax exempt, "have significantly interfered with the integration of the public schools of [Madison] parish."

- Respondents Fred Bracy and Betty Bracy, Alma Lee Griffin and Darnell Griffin alleged that they have children who attend public schools in Monroe, Louisiana. (J.A. 22) Public school desegregation in Monroe was begun in 1970 following a series of federal court decisions beginning in 1968. (J.A. 34)

- Respondents Elsie R. Walker and Anna G. Miller alleged that they have children who attend public school in Prince Edward County, Virginia. (J.A. 20) The United States District Court for the Eastern District of Virginia ordered the Prince Edward County School Board to desegregate its schools in 1959. (J.A. 29) In response, the School Board closed the public schools and local governments subsidized and supported a segregated private school for white children, the Prince Edward Academy. That action was held by this Court in *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), to be a violation of the rights of children situated identically to the children of respondents Walker and Miller. Never-

theless, at the time the Complaint in this case was filed, the federal petitioners continued to recognize the Prince Edward Academy as tax-exempt. *See Prince Edward School Foundation* v. *Commissioner*, 478 F. Supp. 107, 109-10 (D.D.C. 1979), *aff'd*, No. 79-1622 (D.C. Cir. June 30, 1980), *cert. denied*, 450 U.S. 944 (1981).

- Respondent Herbert H. Jackson alleged that his children attend the Boston, Massachusetts public schools. (J.A. 22) Pursuant to court order, the Boston schools began desegregation in September 1974, and an expanded desegregation plan was implemented in September 1975. (J.A. 32)

These respondents alleged that their right to equal educational opportunity is infringed by the grant of federal tax benefits to racially segregated private schools formed or expanded in response to the commencement of desegregation of the public schools they attend. (J.A. 38) They alleged that the grant of federal tax exemptions to such schools constitutes tangible federal financial aid and support for racially segregated educational institutions which is unconstitutional; and that such aid fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW (now the Department of Education), and local school authorities to desegregate public school districts which have been operating racially dual school systems. (J.A. 38-39)

The principal relief sought by respondents is, in essence, the relief obtained by the *Green* plaintiffs in 1980 with respect to Mississippi schools.[7] Respondents alleged

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[7] *See* note 3 *supra*. Respondents seek to represent a nationwide class of all other parents of black children attending public schools which are undergoing or may in the future undergo desegregation. Complaint, ¶ 18. (J.A. 22-23)

that the federal petitioners are continuing to grant tax-exempt status to racially discriminatory private schools despite their professed policy of denying tax-exempt status to such institutions. In practice, respondents alleged, the IRS permits segregated private schools to obtain and keep tax-exempt status by certifying that they do not discriminate even though some do, in fact, discriminate and, in several cases, have been judicially found to discriminate. (J.A. 17-18, 25)[8]

As acknowledged by the government in its brief, respondents' allegation that the IRS is granting federal tax exemptions to discriminatory private schools must be accepted as true for purposes of the standing issue before the Court.[9] The allegation has, in any event, already been admitted by the IRS. In 1979 congressional testimony, then-Commissioner Jerome Kurtz conceded that:

> We concluded that the Service's procedures were ineffective in identifying schools which in actual operation discriminate against minority students, even though the schools may profess an open enrollment

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[8] Petitioners erroneously assert that the Complaint lacks any allegation that these racially segregated private schools are, in fact, discriminatory. Fed. Pet. Brief at 10 n.10; Interv. Pet. Brief at 15 n.47. They ignore the plain import of ¶ 2 of the Complaint that "schools * * * receive tax exemptions merely on the basis of adopting and certifying—but not implementing—a policy of nondiscrimination." (J.A. 17-18) The Complaint further alleges that "[m]any of the private schools described in the foregoing paragraphs have been found to discriminate on the basis of race * * *." Complaint, ¶ 22. (J.A. 25) Thus, far from lacking an allegation that the federal petitioners are continuing to afford exemptions to discriminatory schools, the Complaint alleges federal petitioners' conduct with particularity: they do not seek to determine whether racially segregated private schools which submit unsupported assurances of nondiscrimination in fact are operated on a discriminatory basis.

[9] Fed. Pet. Brief at 19 n.18, citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 115 (1979).

> policy and comply with the yearly publication requirement of Revenue Procedure 75-50 * * *. A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption[s] even though they have been held by Federal courts to be racially discriminatory. This position is indefensible. [*Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (statement of Jerome Kurtz).] [10]

In response to the Complaint, the government and the intervenor, W. Wayne Allen, the founder of Briarcrest Baptist School System, Inc., filed motions to dismiss. The district court granted the motions on three grounds, including lack of standing. (Interv. Pet. App. 3a) The district court held, however, that the dismissal of *Wright* did not affect the status of the companion *Green* litigation because the "jurisdictional" arguments raised in *Wright* already had been rejected in *Green* and the standing of the *Green* plaintiffs already had been upheld in the decision on the merits. (*See* Interv. Pet. App. 3a n.1)

The court of appeals reversed the dismissal of this case on all three grounds relied on by the district court. On the standing issue now before the Court, the court of appeals held that the Court's decisions in *Green*, *Norwood*, and *Gilmore* were "determinative of the standing issue in this case * * *." (Interv. Pet. App. 18b) In so holding, the court of appeals recognized that, like the present case, *Green*, *Norwood*, and *Gilmore* all involved "charges of *government conduct* alleged to be inconsistent with an overriding, constitutionally rooted national policy against

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[10] In addition, after further relief was ordered in *Green* (*see* note 3 *supra*)—the relief respondents seek for their communities in the present case—the IRS revoked the tax exemptions of five Mississippi private schools which discriminate on the basis of race. *See* Affidavit of S. Allen Winborne, *Green* v. *Regan*, D.D.C. No. 1355-69 (July 1, 1983) at 2.

racial discrimination in United States educational facilities." (Interv. Pet. App. 18b [Emphasis in original.]) The court of appeals thus declined to deviate from this Court's holdings that the Constitution bars government aid to segregated schools because that aid, in and of itself, infringes the rights of black schoolchildren to equal educational opportunities.

SUMMARY OF ARGUMENT

Petitioners' argument must stand or fall on the validity of their fundamental premise that respondents are "mere disappointed observers of the governmental process" who are no more injured by the government's aid to private schools that practice racial discrimination than are any other citizens. Fed. Pet. Br. at 17. *See also* Interv. Pet. Br. at 25-27. This premise is fundamentally erroneous because respondents, who are black public schoolchildren in districts where private discriminatory schools were created or expanded at the time of public school desegregation, suffer an impairment of their individual rights to equal educational opportunity when their government aids the private discriminatory schools by giving them tax benefits, just as the black schoolchildren in *Norwood* v. *Harrison*, 413 U.S. 455 (1973) were injured when their government aided private discriminatory schools by giving them free textbooks.

Because respondent schoolchildren are the people whose rights to equal educational opportunity are infringed by government's violation of its obligation to steer clear of aid to private, racially discriminatory schools—and not citizens generally, black citizens generally, or taxpayers generally—this case is not governed by *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Because the wrong of which respondents complain (government aid to private racially discriminatory schools in their communities) can be redressed by injunctive relief against the government,

this case is not governed by *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). On the contrary, this case is governed by *Norwood* where, as the federal petitioners admit, the plaintiffs had standing.

ARGUMENT

BLACK SCHOOLCHILDREN ATTENDING DESEGREGATING PUBLIC SCHOOLS HAVE STANDING TO COMPLAIN OF TANGIBLE GOVERNMENT AID TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS FORMED OR EXPANDED IN THEIR COMMUNITIES AT THE TIME OF THE INITIATION OF PUBLIC SCHOOL DESEGREGATION BECAUSE SUCH GOVERNMENT AID INFRINGES THEIR PERSONAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY.

The parties are agreed that Article III of the Constitution requires a "party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (footnote omitted).

The parties are also agreed that the government may not lawfully grant tax exemptions to discriminatory private schools. *Bob Jones University* v. *United States*, 103 S. Ct. 2017 (1983). *See* Fed. Pet. Br. at 4. Moreover, on review of the grant of a motion to dismiss, it must be taken as true that, as alleged, the Revenue Service is nonetheless granting tax exemptions to private schools that discriminate on the basis of race. *See* note 9 *supra*.

Respondents, black schoolchildren attending desegregating schools, allege that they are injured by the govern-

ment's grant of tax exemptions to racially discriminatory private schools formed or expanded in their communities in response to public school desegregation. The question presented is whether respondents have standing to seek judicial relief. Petitioners contend that respondents lack standing because they assert no more than a "generalized grievance" that they hold in common with all citizens. Fed. Pet. Br. at 24-30; Interv. Pet. Br. at 18-27. We submit, however, that respondents are the victims of the government's unlawful aid to discriminatory private academies in the communities where respondents attend public schools, and that this aid deprives each respondent of the full enjoyment of his or her rights to equal educational opportunity. This injury gives respondents standing to seek redress in the federal courts. Because respondents are injured by federal aid to private discrimination, it is clear that, contrary to petitioners' contention, such injury is redressable by relief against the federal petitioners.

A. The Government's Grant of Tangible Financial Aid to Private, Racially Discriminatory Schools Formed or Expanded in Respondents' Communities at the Time of the Initiation of Public School Desegregation Infringes Respondents' Personal Rights to Equal Educational Opportunity.

Respondents stand on the same footing as the plaintiffs in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). Government support for discriminatory schools in respondents' communities is just as personal a deprivation of respondents' rights to equal educational opportunity as the government's provision of textbooks to such schools in *Norwood*.

The plaintiffs in *Norwood*, parents of black Mississippi schoolchildren, sought to enjoin Mississippi's program of providing free textbooks to private discriminatory schools created or enlarged concurrently with desegregation of

Mississippi public schools. As in this case, the *Norwood* plaintiffs alleged that the program "provided direct [governmental] aid to racially segregated education." 413 U.S. at 457. And, as in this case, "[i]t was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights." *Id.* The Court's holding that the plaintiffs were entitled to relief was based upon the axiom that a government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." 413 U.S. at 465, quoting from *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967) (*per curiam*). Because the provision of textbooks "gives support to such [private] discrimination," plaintiffs were entitled to relief. 413 U.S. at 465.

The decision in *Norwood* is based on the fundamental rationale that, just as a government injures black schoolchildren when it operates a segregated system of education, it injures those schoolchildren when it gives significant aid to private discriminatory schools, especially those organized or expanded concurrently with desegregation. That is why the Court said that: "[a] State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.* at 467.

Both before and after *Norwood*, the injurious effect of private segregated academies on public school desegregation has been apparent.[11] In fact, private schools in the

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[11] *See United States* v. *State of Mississippi*, 499 F.2d 425, 429-30 (5th Cir. 1974) (*en banc*); *Graham* v. *Evangeline Parish School Bd.*, 484 F.2d 649, 650 (5th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d

school districts referred to in the Complaint have been found to have significantly interfered with the integration of the public schools of those districts. *See, e.g.*, Ruling on Proposed Consent Decree of March, 1982, *Northcross* v. *Board of Education of the Memphis City Schools*, No. C-3931 (W.D. Tenn. April 12, 1982) at 20 (referring to the Briarcrest School System, cited in the Complaint at J.A. 26-27); *Brumfield* v. *Dodd*, 405 F. Supp. 338, 346 (E.D. La. 1975) (referring to effect of Delta Christian Academy and Tallulah Academy on the public schools of Madison parish); and *Gilmore* v. *City of Montgomery*, 337 F. Supp. 22, 24 (M.D. Ala. 1972), *rev'd in part*, 473 F.2d 832 (5th Cir. 1973), *aff'd*, 417 U.S. 556, 569 (1974) (referring to effect of Montgomery Academy on public school desegregation in Montgomery).

However, the Court in *Norwood* did not rest its decision on any requirement of a showing of a "precise causal relationship" between the state aid and public school desegregation. 413 U.S. at 464-68. On the contrary, the Court held that the provision of significant aid, *in and of itself*, injured plaintiffs. *Id.*

The District Court in *Norwood* had failed to recognize the personal nature of the injury suffered by black schoolchildren when the government aids educational discrimina-

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836, 848-49 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (*en banc*), *cert. denied*, 389 U.S. 840 (1967); *Brumfield* v. *Dodd*, 405 F. Supp. 338, 342 (E.D. La. 1975); *Coffey* v. *State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969); *Poindexter* v. *Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 857 (E.D. La. 1967) (three-judge court), *aff'd*, 389 U.S. 571 (1968). *See also, e.g.*, D. Bell, *Race, Racism and American Law* 496-97 (1973); D. Nevin and R. Bills, *The Schools That Fear Built—Segregationist Academies in the South* 12 (1976); Terjen "The Segregation Academy Movement," in Southern Regional Council, *The South and Her Children, School Desegregation 1970-71* at 79 (1971); U.S. Commission on Civil Rights, *School Desegregation in Ten Communities* 17, 29, 36, 80 (1973); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1450-53 (1973).

tion in their community. 340 F. Supp. 1003 (N.D. Miss. 1972). It held that the plaintiffs had not satisfied the requirement of showing that the "plaintiff is himself immediately harmed, or immediately threatened with harm, by the challenged action * * *", *id.* at 1014, because there was no showing that any child would withdraw from a private school and enroll in the public schools if deprived of free textbooks, and because, in any event, the issuance of free textbooks to students attending private schools had failed to defeat the establishment of a state-wide unitary school system. *Id.* This Court reversed, holding that "the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." 413 U.S. at 465-66. Moreover, the Court held that the fact that the State's public schools were unitary was irrelevant. *Id.* at 468. In sum, the essence of *Norwood* is that government aid to discriminatory private schools in and of itself infringes the rights of black schoolchildren attending the public schools to equal educational opportunity.

The standing of respondents in this case follows inexorably from *Norwood*. The aid given to the private schools in this case is far more "significant" than that involved in *Norwood*.[12] "[T]ax exemptions and tax-deductibility are a form of subsidy," *Regan* v. *Taxation With Representation of Washington*, 103 S. Ct. 1997, 2000 (1983); a federal tax deduction is the practical equivalent of a matching grant, *Green* v. *Kennedy*, 309 F. Supp. at 1134; *McGlotten* v. *Connally*, 338 F. Supp. 448, 456 n.37 (D.D.C. 1972). Indeed, in *Norwood*, this Court expressly relied on prior cases prohibiting state aid in the form of tuition grants, tuition loans, *and tax subsidies* (citing *Green* v. *Connally* itself) to racially discriminatory private schools; in so doing, the Court de-

[12] There can be no doubt that federal aid is every bit as injurious as state aid. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

clared that "[a] textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by [those] prior cases." 413 U.S. at 463 & n.6. Accordingly, the allegations of respondents' complaint, which directly parallel those in *Norwood*, establish the requisite injury, just as plainly as did the allegations in *Norwood*. The government's aid to racially discriminatory schools formed or expanded at the time of the commencement of the process of desegregation in respondents' communities infringes respondents' right to equal educational opportunity, just as the provision of textbooks to such schools injured the plaintiffs in *Norwood*.

Norwood is one case in what this Court recognized in *Bob Jones University* v. *United States*, 103 S. Ct. at 2029 as "[a]n unbroken line of cases following *Brown* v. *Board of Education* [that] establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, *as well as rights of individuals.*" [Emphasis added.] More important, for present purposes, that unbroken line of decisions also makes clear that the "individuals" whose "rights" are violated by government aid to racial discrimination in education are the black schoolchildren whose right to equal educational opportunity is infringed by that support.[13]

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[13] *See Norwood* v. *Harrison*, 413 U.S. 455 (1973); *South Carolina State Bd. of Educ.* v. *Brown*, 393 U.S. 222, *aff'g per curiam* 296 F. Supp. 199 (D.S.C. 1968); *Louisiana Fin. Assistance Comm'n* v. *Poindexter*, 389 U.S. 571 (1968), *aff'g per curiam* 275 F. Supp. 833 (E.D. La. 1967); *Wallace* v. *United States*, 389 U.S. 215, *aff'g per curiam Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967); *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964); *St. Helena Parish School Bd.* v. *Hall*, 368 U.S. 515 (1962), *aff'g per curiam* 197 F. Supp. 649 (E.D. La. 1960); *Orleans Parish School Bd.* v. *Bush*, 365 U.S. 569, *aff'g per curiam* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1961); *Faubus* v. *Aaron*, 361 U.S. 197, *aff'g per curiam Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (*per curiam*).

In *Brown* itself, the Court held that the affected "children of the minority group" suffer a personal deprivation of "equal educational opportunities." *Brown* v. *Board of Education*, 347 U.S. at 493. The Court focused squarely on the injury suffered by black schoolchildren when their government sanctions segregated schooling:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. [347 U.S. at 494 (quoting trial court findings) (footnote omitted).]

Similarly, *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974) reaffirmed the rationale of *Norwood* and recognized that exclusive use of city recreational facilities by private discriminatory schools infringed the "constitutional rights of children not to be discriminated against * * *." 417 U.S. at 568, quoting from *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958). In *Griffin* v *County School Board of Prince Edward County*, 377 U.S. 218 (1964), the Court unanimously held that support provided to private segregated schools by tuition grants and tax credits unconstitutionally injured black schoolchildren in Prince Edward County. *Id.* at 225. The "perpetuation of racial segregation" afforded by government aid to private schools denied the rights of black public schoolchildren to an equal educational opportunity. *Id.* at 232. Similarly, in *Green*, the Mississippi component of the present litigation, the three-judge district court, in granting a preliminary injunction, explicitly held that children situated identically to respondents had standing to complain of the

injury they suffered as a result of the Revenue Service's grant of tax-exempt status to discriminatory schools in Mississippi. *Green* v. *Kennedy*, 309 F. Supp. 1127, 1132 (D.D.C.), *appeal dismissed sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970). This Court affirmed, without opinion, the grant of a permanent injunction. *Coit* v. *Green*, 404 U.S. 997 (1971).[14] Thus, from *Brown* to *Norwood* to *Bob Jones*, this Court has never wavered from the proposition that government support of discriminatory treatment—including discriminatory treatment by private schools—inevitably harms black schoolchildren because it "*exerts a pervasive influence on the entire educational*

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[14] The government seeks to minimize the significance of the Court's decision in *Green* by reference to *dicta* in *Bob Jones Univ.* v. *Simon*, 416 U.S. 725 (1974). Fed. Pet. Br. at 18, 47-48. The government points to the Court's remark that because the government had changed its position regarding the tax-exempt status of segregated private schools, "[this] Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." 416 U.S. at 740 n.11. Although the summary affirmance may not have endorsed the specific reasoning of the lower court, it necessarily confirmed the holding. Since the court has repeatedly stated that it has an affirmative obligation to ensure that jurisdiction is present, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978); *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278 (1977), by confirming the holding in *Green* it confirmed standing. Thus, the *Green* affirmance falls within the principle advocated by the government. "The precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979), quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). Fed. Pet. Br. at 47-48.

Moreover, on the issue of the injury to black public schoolchildren, there can hardly be doubt that the Court considered its summary affirmance in *Coit* v. *Green* to be of precedential value. In *Norwood* v. *Harrison*, the Court specifically relied on *Coit* v. *Green* to support its conclusion that Mississippi unconstitutionally injured black public schoolchildren by providing textbooks to discriminatory private schools. 413 U.S. at 463 n.6.

process." *Bob Jones University*, 103 S. Ct. at 2030, quoting *Norwood*, 413 U.S. at 469 (emphasis by the Court).

Once it is clear that the injury suffered by respondents is the infringement of their equal educational opportunity occasioned by government support for discriminatory education in their communities, it is at once also clear that that injury is a personal one, and that it can be immediately redressed by a favorable decision requiring withdrawal of the government's support. Accordingly, respondents have standing under the traditional tests. *See, e.g., Gladstone, Realtors* v. *City of Bellwood*, 441 U.S. 91, 113 n.26 (1979) ("the deprivation of the benefits of interracial association constitutes the alleged injury"); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (standing rested not on failure to be admitted to medical school due to affirmative action program, but preclusion from opportunity to compete for all places, an alleged violation of fundamental rights); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179 (1972) (plaintiff had standing to seek decree enjoining enforcement of state regulation insofar as it required the Moose Lodge to comply with its racially discriminatory rules); *Baker* v. *Carr*, 369 U.S. 186, 208 (1962) (alleged diminution of "[a] citizen's right to a vote free of arbitrary impairment by state action" is legally cognizable injury adequate to confer standing).[15]

B. The Two Cases Principally Relied Upon by Petitioners, *Eastern Kentucky* and *Valley Forge*, Do Not Control This Case.

The entire argument of the petitioners rests upon their puzzling refusal to recognize that the respondent black schoolchildren are the victims of the government's unlawful aid to private racial discrimination. Once this im-

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[15] *See also Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) (deprivation of procedural due process rights is actionable without other actual injury).

portant fact is recognized, it is clear that the two cases principally relied upon by the petitioners have no bearing on this case.

1. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), did not involve plaintiffs who were being denied equal protection of the laws by government aid to racial discrimination. The plaintiffs in that case were indigents who complained that they were being denied medical treatment by hospitals that were accorded tax-exempt status as charities. This Court held that plaintiffs lacked standing because it was "purely speculative" whether the injury complained of (denial of medical service) could be fairly traced to the challenged action of the Revenue Service rather than to "decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43. The Court found it "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of [the] services" they sought from the hospitals. *Id.* at 43.

The difference between *Eastern Kentucky* and this case is the constitutional law declared in *Brown* and *Norwood*: government aid to segregated schooling, in and of itself, injures black schoolchildren. Therefore, unlike *Eastern Kentucky*, the injury complained of here is a direct consequence of the unconstitutional conduct of the federal petitioners and would be redressed by grant of the relief sought. Respondents here do not seek admission to private schools which exclude black students. Rather, they seek an end to government support of racial discrimination that injures them.

The federal courts have the power and duty to redress respondents' injury by ordering the Revenue Service to adopt procedures that will be effective to terminate the grant of tax benefits to racially discriminatory schools. Accordingly, this case is not governed by *Eastern Ken-*

tucky, but by *Norwood*, where this Court held that the district court erred in thinking that plaintiffs were required to show that withdrawal of the free textbooks would cause students to transfer from private to public schools. Chief Justice Burger, writing for the Court, explained:

> We do not agree with the District Court in its analysis of the legal consequences of [the] uncertainty [whether the relief requested would result in student transfers from private to public schools], for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A state may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. [413 U.S. at 465-66.]

2. The respondents here are not claiming generalized injury as citizens or taxpayers, and thus the case is not governed by *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In that case, an organization dedicated to the separation of church and state challenged a gift of government property to a church-related college on the ground that such gift violated the Establishment Clause of the First Amendment. The plaintiff claimed that its members were injured in the form of "depriv[ation] of the fair and constitutional use of [their] tax dollar." 454 U.S. at 476. The Court concluded that the organization had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." 454 U.S. at 487 (footnote omitted) (emphasis in original). The organization alleged no nexus between itself or its members and the challenged government action: "[The organization] complain[s] of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in

Washington, D.C. They learned of the transfer through a news release." 454 U.S. at 486-87 (footnote omitted).

It does petitioners no credit to claim that the respondents here have no more than the same "generalized grievances about the conduct of government" that the Court attributed to plaintiffs in *Valley Forge*. Respondents here are the schoolchildren who suffer a denial of equal protection when the Revenue Service subsidizes segregated schooling in their school districts. The court in *Valley Forge* distinguished *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) on the ground that the plaintiffs in the latter case were "school children and their parents, who were directly affected by the laws and practices against which their complaints are directed" which "interests surely suffice to give the parties standing to complain." 454 U.S. at 486-87 n.22, quoting from 374 U.S. at 224 n.9. Respondents here are likewise schoolchildren and their parents and are directly affected by the practices against which their complaints are directed.[16]

C. Petitioners' Subsidiary Standing Arguments Are Erroneous.

Federal petitioners are in error when they suggest that respondents somehow seek standing as representatives of other members of their race who may have suffered injuries. Fed. Pet. Br. at 28 n.24. Respondents do not seek to represent black people in general, or black children who have been denied admission to discriminatory private schools. Respondents assert a claim on their own behalf, and others similarly situated, as black public school-

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[16] The present case is readily distinguished from *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) and *United States* v. *Richardson*, 418 U.S. 166 (1974), in which no citizen had any greater interest than any other in asserting the rights at issue. Respondents do not assert a generalized right of all American citizens, but their particularized, enforceable right to equal educational opportunity for their children.

children whose rights to equal educational opportunities are impaired when the federal government supports discriminatory private schools in their own communities.

Nor do repondents complain of injury as taxpayers or seek "taxpayer standing." It is therefore immaterial that they have not alleged an effect on their own tax liability by the government conduct they challenge. *See* Fed. Pet. Br. at 12. Neither do respondents seek to "litigate the tax liability of third parties." Fed. Pet. Br. at 36-43. Respondents seek no judicial relief directed against any third party. They seek, instead, an injunction against the government's grant of tangible financial aid, in the form of tax benefits, to discriminatory private schools. The grant of such relief does not determine the tax liability of any third person.

Finally, the government's brief is far removed from reality when it suggests that respondents are merely dissatisfied bystanders at a public debate of high-minded matters of tax policy. *See* Fed. Pet. Br. at 43. Respondents are no bystanders. They are the victims of a government policy of granting aid to private discrimination. But for the judicial relief sought and obtained by the respondent victims, the government would have returned to the interpretation of the Internal Revenue Code it adhered to prior to the filing of *Green*, namely, that discriminatory schools are entitled to tax exemptions. On January 8, 1982, while the petitions for certiorari in this case were pending, the IRS announced just such a policy and stated its intent to grant tax exemptions to two schools that had been determined to discriminate on the basis of race, Bob Jones University and Goldsboro Christian Schools. Only after respondents in this case had sought and obtained an order of the Court of Appeals directing the IRS not to grant or restore tax-exempt status to schools that failed to maintain a racially nondiscriminatory policy as to students, did the government abandon its plan to restore and maintain tax-exempt

status for discriminatory private schools. *See Bob Jones University* v. *United States*, 103 S. Ct. at 2025 n.9.

The history of this case makes plain that, unless the victims of unlawful government aid to private discrimination have standing to complain of the injury inflicted by such government aid, *Brown's* promise of equal opportunity is hollow.

D. The Government's Concession That the Plaintiffs in *Norwood* Had Standing Is Tantamount to a Concession That Respondents Here Have Standing As Well.

The government concedes that the plaintiffs in *Norwood* had standing, but argues that their standing arose only "by virtue of their position as successful litigants in a related desegregation suit; their injury was the State's interference with their rights under the decree." Fed. Pet. Br. at 45; *see id.* at 18. In other words, the government concedes that *some* black schoolchildren have standing to bring the instant action, but seeks to limit the class of those who have standing to plaintiffs who were parties to an earlier school desegregation order. That limitation, however, cannot logically bar standing for members of a certified plaintiff class in a desegregation suit who indisputably have the same status and concrete interest as named plaintiffs in terms of being bound by, and having a right to enforce, a judgment.[17] Moreover, in the nature of a school desegregation order, "non-party" black schoolchildren in the community benefit as a matter of right:

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[17] *See Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) in which the Court held that a class of unnamed persons described in a class certification acquired a legal status, separate from the interests asserted by the named representative, which satisfied the Article III requirement. *Accord, Sosna* v. *Iowa*, 419 U.S. 393 (1975).

> There is at least considerable doubt that relief confined to individual specific Negro children either could be granted or, if granted, could be so limited in its operative effect. By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. *But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others* * * *. [*Potts* v. *Flax*, 313 F.2d 284, 289 (5th Cir. 1963) (emphasis added).]
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> *Accord*, *Bailey* v. *Patterson*, 323 F.2d 201, 206-07 (5th Cir. 1963), *cert. denied sub nom. Jackson* v. *Bailey*, 376 U.S. 910 (1964).

The fact that all black public schoolchildren have a concrete interest in a school desegregation order respecting their schools completely undercuts the government's attempt to limit the effect of its concession that the plaintiffs in *Norwood* had standing.[18] Respondent Herbert H.

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[18] The sentence in a footnote in *Gilmore* on which the government rests its attempted limitation is not inconsistent with the fundamental principles cited in the text. That sentence—which recited that "[t]he plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered", 417 U.S. at 570-71 n.10—did not purport to articulate a new principle of standing. The footnote grew out of the distinction between the standing of black citizens to enjoin exclusive use of the city's parks by segregated private schools (which was unquestioned in *Gilmore*) and the standing of citizens in a parks case to challenge certain nonexclusive uses of the parks by private school groups (which was questioned in *Gilmore*). In the sentence quoted by the government and those which follow it, the Court carefully distinguished the situation of *minority schoolchildren* litigants seeking to enjoy the benefits of school desegregation:

> The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the

Jackson is a member of the certified plaintiff class in the Boston school desegregation litigation,[19] and would have standing even under the government's narrow formulation of its limitation. Moreover, respondents Inez Wright, Geneva Walker, Delores G. Beamon, Mary Louise Belser, Etherline House, Lou Ella Jackson, John Wilbur Wright, Lavinia Washington, Robert Jackson, Moses Williams, Fred and Betty Bracy, Alma Lee and Darnell Griffin, Elsie R. Walker, and Anna G. Miller live in districts in which schools are desegregating pursuant to court order. *See supra* pp. 6-9. As the special beneficiaries of such orders, they have an interest that is more than adequate to establish a basis for intervention as of right under Fed. R. Civ. P. 24(a), and they would, if the other prerequisites were satisfied, be entitled to intervene to enforce the outstanding desegregation decrees in their communities.[20] Finally, the other respondents reside in

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concrete injury they suffered. Here, the plaintiffs were parties to an action desegregating the city parks and recreational facilities. Without a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. [*Id.*]

Viewed in context, therefore, the statement in the footnote cannot be read as an indication that the *Norwood* plaintiffs' standing flowed only from their status as *parties* to a school desegregation case. The use of the term "parties" in the sentence upon which the government relies was merely for the purpose of contrasting the *Norwood* plaintiffs' relationship to a *school desegregation* case with the *Gilmore* plaintiffs' relationship to a *parks desegregation* suit.

[19] *See supra* p. 9; *Morgan* v. *Hennigan*, 379 F. Supp. 410, 415 n.1 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[20] *E.g.*, *Tasby* v. *Estes*, 572 F.2d 1010, 1012 n.2 (5th Cir. 1978), *cert. dismissed sub nom. Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437 (1980); *Atkins* v. *State Bd. of Educ.*, 418 F.2d 874 (4th Cir. 1969); *Liddell* v. *Caldwell*, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *United*

districts where school desegregation was begun in connection with HEW administrative proceedings, as a result of which they have rights and interests no less concrete than persons who reside in districts where desegregation results from a court order. *See Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475 (M.D. Ala.), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967) (*per curiam*).

In sum, the government's brief itself illustrates the soundness of respondents' position that there is no principled basis on which this case can be distinguished from *Norwood*. Accordingly, just as the plaintiffs in *Norwood* had standing to complain of the government's grant of textbooks to discriminatory private schools in their communities, respondents here have standing to complain of the government's grant of tax benefits to private discriminatory schools formed or expanded in their communities at the time of the initiation of desegregation of the public schools respondents attend.

States v. *State of Georgia*, 428 F.2d 377 (5th Cir. 1970); *Brown* v. *Board of Educ.*, 84 F.R.D. 383, 397 (D. Kan. 1979). *See also Miller* v. *Board of Educ. of Topeka*, 667 F.2d 946 (10th Cir. 1982) (intervention in ongoing desegregation litigation rather than independent action is appropriate procedure for parents dissatisfied with lack of desegregation achieved under prior remedial orders); *Hines* v. *Rapides School Bd.*, 479 F.2d 762, 765 (5th Cir. 1973) (same).

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

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Nos. 81-757 and 81-970

In the Supreme Court of the United States

OCTOBER TERM, 1983

W. WAYNE ALLEN, PETITIONER

v.

INEZ WRIGHT, ET AL.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

INEZ WRIGHT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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Respondents' argument is based almost solely on an analogy to *Norwood* v. *Harrison*, 413 U.S. 455 (1973) (Resp. Br. 14-21, 23, 26-29). Yet respondents consistently confuse *Norwood*'s substantive holding — that the State of Mississippi was not entitled to give significant support to discriminatory private schools — with the question of *standing*.

Respondents may be correct that the Court's substantive holding in *Norwood* did not rest "on any requirement of a showing of a 'precise causal relationship' between the state

aid and public school desegregation" (Resp. Br. 16). The question of *standing*, however, hinges precisely on whether the alleged injury, if any, "fairly can be traced to the challenged action of the defendant." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Respondents' extended discussion of the merits of *Norwood* (Resp. Br. 14-18, 20-21, 23) — the only issue with which that opinion deals — is simply irrelevant to the issue here. On the issue of standing, *Norwood* provides little, if any, support for respondents' argument.

Norwood arose in an entirely different context from this case. The action in *Norwood* was but one part of a larger litigation brought by public school children to compel state and local school authorities to put an end to the de jure segregation of their schools. The State's provision of textbooks to these so-called "private" schools in *Norwood* was in essence a means for perpetuating the prior segregated public school system. As this Court explained in *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 570-571 n.10 (1974) (emphasis added), "The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was *directly related* to the concrete injury they suffered." Here, respondents' lawsuit is unrelated to any specific school desegregation litigation.[1] The federal petitioners are strangers to any school desegregation cases that might affect respondents, and it is hard to see how the guidelines and procedures they employ on a nationwide basis to

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[1]Respondents point out that one respondent is within a certified plaintiff class in the Boston school desegregation litigation and that other respondents "live in districts in which schools are desegregating pursuant to court order" (Resp. Br. 27-28). By no stretch of the imagination, however, could it be thought that this action, which seeks nationwide relief in the form of changes in IRS regulations, is "directly related" to those desegregation suits.

enforce the provisions of the tax code could be considered "directly related" to any school desegregation decree.[2]

Moreover, as respondents concede (Resp. Br. 13), there is no dispute here about the underlying substantive law. Under Internal Revenue Service guidelines and procedures, to qualify for tax-exempt status a private school must both publicly announce and operate in accordance with a racially nondiscriminatory policy. Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 (Interv. Pet. App. 1e-12e).[3] Respondents' complaint is simply that "some schools 'are slipping through the Commissioner's net of enforcement' " (Interv. Pet. App. 22b n.27). Presumably, the same can be said of every penal and regulatory statute. Any tax exempt schools that racially discriminate today do so in violation of IRS rules. Even if a litigant in a particular case would have standing to challenge an unconstitutional law or program, as in *Norwood*, it does not follow that he would have standing to challenge the enforcement procedures under a concededly appropriate law or program.

In any event, we think that respondents read too much into *Norwood* when, despite the opinion's total silence on the issue of standing, they use it to support a sweeping new

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[2]Respondents erroneously assert (Resp. Br. 26 (emphasis in original)) that "the government concedes that *some* black schoolchildren have standing to bring the instant action, but seeks to limit the class of those who have standing to plaintiffs who were parties to an earlier school desegregation order." On the contrary, we doubt that a challenge to nationwide IRS enforcement guidelines and procedures could *ever* be so "directly related" to a public school desegregation suit (*Gilmore* v. *City of Montgomery*, 417 U.S. at 570-571 n. 10, explaining the basis for standing in *Norwood*) as to serve as a basis for standing.

[3]As set forth in the cited pages (Interv. Pet. App. 1e-12e), Rev. Proc. 75-50 prohibits, in some detail, racial discrimination with respect to student admissions, faculty, school programs, and tuition and scholarship practices.

theory of standing which, as the court of appeals recognized (Interv. Pet. App. 16b), points in an "opposite direction[]" from *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), and other decisions of this Court expressly addressing the pertinent principles of standing. Moreover, neither the court of appeals in its opinion nor respondents in their brief even purport to construct a coherent doctrine of standing from their reading of *Norwood*. They suggest no limiting principle that would distinguish their claim to standing in this case from that of any other citizens who seek to challenge the adequacy of governmental efforts to enforce laws important to them.

Respondents' attempts to distinguish *Eastern Kentucky* (Resp. Br. 22-23) and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (Resp. Br. 23-24) consist of no more than a blurring of the two distinct claims of injury they made in the district court. As we showed in our initial brief (Fed. Pet. Br. 24-28), respondents' first allegation of injury — violation of their asserted right to have the federal government "steer clear" of aid to discriminatory schools[4] — establishes no injury in fact. "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge College*, 454 U.S. at 483. There is accordingly no relevance in respondents' claim that their grievance on this score is "a direct consequence of the unconstitutional conduct of the federal petitioners and would be redressed by grant of the relief sought" (see Resp.

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[4]It should not be overlooked that respondents seek standing in this case to obtain relief directed to the tax exempt status not of discriminatory schools only, but also of any other schools (whatever their policies) that may be used by "white children avoiding attendance in desegregating public school systems" (J.A. 40). See Fed. Pet. Br. 20-21 & n.20.

Br. 22-23) — as could equally have been said of the claim in *Valley Forge College*. Respondents further argue that their second allegation of injury —interference with their right to attend desegregated public schools — establishes, unlike the "generalized grievance[]" in *Valley Forge College*, an injury to their "particularized, enforceable right to equal educational opportunity for their children" (Resp. Br. 24 & n.16).[5] But this second asserted injury (if it exists at all) is neither caused by the actions of the federal petitioners nor susceptible to redress against them in court. As we showed in our brief (Fed. Pet. Br. 32-35), respondents' second claim of injury is far more "speculative" even than that rejected by this Court in *Eastern Kentucky*. The alleged injury to respondents is twice removed from the government conduct they seek to challenge. The racial composition of the public schools in respondents' districts is affected only insofar as thousands of white parents make individual decisions on where to send their children to school. These decisions may or may not be significantly affected by whatever changes in policy the affected private schools may (or may not, as *Eastern Kentucky* points out) make in response to changes in IRS regulations.[6]

In short, neither allegation of injury satisfies *both* of the elements required as an "irreducible minimum" by Article III (*Valley Forge College*, 454 U.S. at 472): (1) the plaintiff must allege "distinct and palpable injury to himself" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), and (2) the injury must be fairly traceable to the alleged illegal conduct of the defendant and likely to be redressed by a favorable decision (*Valley Forge College*, 454 U.S. at 472).

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[5]But see Fed. Pet. Br. 31-32.

[6]Indeed, it is improbable that the racial composition of public schools would be substantially affected by a private school's decision to implement a bona fide policy of nondiscrimination, or even of affirmative outreach.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENTS.

On Writs of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The National Association for the Advancement of Colored People ("NAACP") is a New York Corporation organized in 1909 to combat racial discrimination in all facets of American life. 1/ It has more than 400,000 members, organized in 1600 branches and 450 College and Youth Councils, located in all fifty states.

The Memphis (Tennessee) Branch of the NAACP has been chartered by the National Board of Directors to carry out the policies and programs of the NAACP in, among other areas, education, housing, employment, public accommodations, and voting rights. Many members of the Memphis Branch have children attending the public schools in Memphis, Tennessee, who are directly affected by the federal

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1/ Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

government's support for racially discriminatory private schools in Memphis and by the resulting interference with the ongoing efforts of the federal courts to desegregate the Memphis public schools.

The Montgomery (Alabama), Farmsville (Virginia), Orangeburg (South Carolina), Natchitoches (Louisiana), Monroe (Louisiana), and Boston (Massachusetts) Branches of the NAACP have all been chartered by the National Board of Directors to carry out the policies and programs of the NAACP in, among other areas, education, housing, employment, public accommodations, and voting rights. Many members of these branches have children attending the public schools in Montgomery (Alabama), Prince Edward County (Virginia), Orangeburg (South Carolina), Natchitoches Parish (Louisiana), Monroe (Louisiana), and Boston (Massachusetts), who are directly

affected by the federal government's support for racially discriminatory private schools in their communities and by the resulting interference with ongoing efforts to desegregate their public schools.

The NAACP, which has appeared in this Court in countless cases involving racial justice, embodies the legal interests of hundreds of thousands of minority Americans, as well as non-minority Americans, with respect to those issues. See e.g., NAACP v. Federal Power Commission, 425 U.S. 662 (1976); NAACP v. Button, 371 U.S. 415 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama, 357 U.S. 449 (1958). Many of those members and their children are injured by the operation of federally subsidized, racially discriminatory private schools

in their local communities. If petitioners succeed in insulating this support from judicial scrutiny by means of an artificial standing rule, state and federal governments will be free to expand their tax subsidies to racially discriminatory private schools, greatly magnifying the harm already being inflicted on NAACP members and their children.

SUMMARY OF ARGUMENT

The court of appeals correctly held that respondents had standing under Article III to challenge the IRS's support of racially discriminatory private schools in their communities. Federal support for this semi-private dual school system both inflicts direct injury on black public schoolchildren and causes serious interference with attempts to desegregate their public schools. The

allegations of the Complaint (which must be taken as true) amply satisfy the familiar Article III standing tests of injury, causation, and likelihood of redress.

The court of appeals was also right to reject the sweeping "prudential" standing rule proffered by petitioners. In those rare instances where tax authorities' treatment of a taxpayer infringes the constitutional rights of another, reason, policy and precedent all require that the injured party be permitted to assert his constitutional rights. Finally, in the circumstances of the present case the very considerations that underlie prudential standing rules weigh heavily against application of a rule that would bar respondents from litigating their statutory claims.

ARGUMENT

The issue raised in this case, although framed in terms of "injury," is whether the federal government shall remain committed to eradicate root and branch the persisting vestiges of the old dual school systems that it has helped to support for most of this century. The historical background of this controversy should be too well-known to require repetition. The federal petitioners, however, now argue as if respondents could have no standing unless they alleged these notorious facts explicitly in their Complaint. Amici must therefore begin by reviewing events that can hardly be forgotten.

The Prince Edward School Foundation is emblematic of the wrongs that necessitated this litigation. Prince Edward County, Virginia, was one of the school systems before this Court in Brown v.

Board of Education, 347 U.S. 483 (1954). Under Virginia's program of resistance to desegregation, the Foundation was created as a surrogate to provide education for white children while the public schools were dismantled. The white faculty and student body of the county schools were transferred intact to this nominally private institution. 2/ The Foundation received a federal charitable tax exemption from the start. 3/ The state and the county supported the Foundation as the sole means of education in the county through tuition grants and tax credits until they were ordered to terminate the payments and to reopen the public schools. Griffin v. County School

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2/ Griffin v. Board of Supervisors, 339 F.2d 486, 492 (4th Cir. 1964).

3/ Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), aff'd mem., No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981).

Board, 377 U.S. 218 (1964). Prior to that time, county property tax incentives had operated in combination with its charitable status to encourage contributions to the Foundation. Id. at 223-24. Thereafter, the state continued to disburse tuition grants for attendance at the Foundation's schools until the federal court enjoined them in 1969. 4/ Since then, the Foundation has never admitted a black child, and has never announced or publicized a reversal of its discriminatory policy. 5/ Two-thirds of the white children in Prince Edward County attend the Foundation schools, while the public schools remain 75%

4/ Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969).

5/ Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), aff'd mem., No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981).

black. 6/ Nonetheless, it was not until November 1976, after the initiation of this lawsuit, that the IRS even commenced proceedings to revoke the Foundation's charitable tax exemption. 7/ The petitioners ask this Court to hold that the government's support of the Prince Edward School Foundation through 1978 inflicted no judicially cognizable injury on Sonja Walker, Cornell Walker, Jr., Joseph Miller, Jr., and the two thousand other black school children in Prince Edward County. Amici agree with

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6/ See IRS Tax Exemptions and Segregated Private Schools: Hearings Before Subcomm. on Civil & Constitutional Rights, House Comm. on Judiciary, 97th Cong., 2d Sess. [hereinafter cited as 1982 Hearings] 68 (1983) (testimony of Arthur S. Flemming, Chairman of United States Commission on Civil Rights).

7/ Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), aff'd mem., No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981).

the court of appeals that the government's conduct inflicted injury that can and must be redressed.

The federal government itself, of course, also operated dual school systems until 1954. After this Court's decisions in Bolling v. Sharpe, 347 U.S. 497 (1954), and Brown v. Board of Education, 347 U.S. 483 (1954), the federal government continued to provide financial assistance to segregated public schools. Congress first acted to withhold this assistance in 1964. 8/ In 1967 the Internal Revenue Service finally recognized the principle that charitable tax exemptions under I.R.C. §501(c)(3)

8/ Civil Rights Act of 1964, tit. VI, Pub. L. No. 88-352, 78 Stat. 252. The federal government has not always displayed zeal in enforcing this prohibition. See, e.g., Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc); cf. Hills v. Gautreaux, 425 U.S. 284 (1976).

could not be granted to segregated "private" schools whose involvement with the state was so extensive that their operation amounted to state action. 9/ Only in 1970, under pressure of litigation, did the IRS acknowledge that Section 501(c)(3) forbade exemptions for racially discriminatory private schools that were not state actors. See Green v. Connally, 330 F. Supp. 1150, 1156 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971). The federal petitioners now claim that that litigation should have been dismissed for lack of standing, and the decision whether or not to conform tax administration to fundamental law should have been left to unreviewable discretion of the IRS.

9/ See Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C.), appeal dismissed, 398 U.S. 956 (1970).

Although this Court has reaffirmed the requirement that discriminatory schools be denied tax exemptions in Bob Jones University v. United States, 103 S. Ct. 2017 (1983), petitioners assert that no black child or parent has a cognizable stake in its enforcement.

The IRS has no unreviewable right to play understudy to Virginia or to any other state as the public benefactor of segregation academies. The federal government, no less than the states, must steer clear of supporting a dual school system in any guise. Under familiar principles of standing, public school-children are entitled to seek judicial invalidation of tuition tax credits, "charitable" tax exemptions, or any other device that channels government support into racially discriminatory private schools in their communities.

Few situations could present so immediate and fundamental a violation of constitutional rights by means of tax administration as the present controversy. The government's affirmative constitutional duty to distance itself from racial discrimination in private education grows out of a profound national tragedy without parallel. To insulate state and federal taxing authorities from that obligation by adopting an artificial rule of standing would invite a repetition of that tragedy.

I. THE COURT OF APPEALS CORRECTLY FOUND THAT RESPONDENTS HAD ALLEGED ALL THE ELEMENTS NECESSARY TO CONFER STANDING UNDER ARTICLE III.

The Complaint in this case contains all the elements requisite to a finding that respondents have standing under Article III. Those elements are well-established: plaintiff need only "'show that he personally has suffered

some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' ... and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United For Separation of Church And State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41 (1976)) (citations omitted).

Those elements are manifestly present: the Complaint alleges that each plaintiff is a child or the parent of a child attending public school in districts currently undergoing the process of desegregation. There exist in each of their communities racially discrimina-

tory 10/ private schools whose operation interferes with the desegregation process. Defendants have granted these institutions tax exemptions, supporting and encouraging the continuation and expansion of this interference; the Complaint alleges that this conduct itself interferes with ongoing desegregation efforts

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10/ As the Complaint repeatedly alleges, many of those private schools have satisfied the limited concerns of the IRS by "adopting and certifying -- but not implementing" a policy of nondiscrimination. Some schools have refused to adopt even a pro forma policy of nondiscrimination. See, e.g., Complaint ¶ 46 (Orangeburg, South Carolina, where the children of plaintiffs Robinson and Zimmerman attend school). Nonetheless, petitioners insist that the Complaint should be construed against respondents, and that it should be read as if respondents were objecting to a coincidental absence of black children in "racially segregated" schools. Petitioners' persistence in this argument is especially odd since respondents have already disavowed that explanation before this Court. Brief in Opposition to Certiorari at 4 n.3. To decide this case on the basis of petitioners' play on words, in violation of the usual procedures, would lead to a tremendous waste of judicial resources, since all the same issues would be relitigated on a new or slightly amended Complaint.

in the respective communities. Furthermore, such federal financial involvement in the effective maintenance of a segregated school structure inflicts injury ipso facto on the black children who must experience that structure.

Since the standing question was decided on a motion to dismiss, the allegations in the Complaint of facts constituting injury must be taken as true. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Warth v. Seldin, 422 U.S. 490, 501 (1975). The Complaint must be construed in favor of respondents. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975). Dismissal is warranted only if it can be said as a matter of law that facts proven to substantiate the allegations could not

demonstrate cognizable injury. 11/ Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

The Complaint must also allege a "'fairly traceable' causal connection between the injury it claims and the conduct it alleges, ... so that if the relief sought is granted, the injury will be redressed." Watt v. Energy Action Educational Foundation, 454 U.S. 151, 161 (1981) (citations omitted). The defendants' conduct may inflict injury directly, or it may do so indirectly, by influencing the actions of third parties. Havens Realty Corp. v. Coleman, 455 U.S. 363, 375 (1982); Duke Power Co. v. Carolina Environmental Study Group, Inc.,

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11/ If the factual averments are too general to make clear the alleged injury, a motion for more definite statement, not a motion to dismiss, may be granted. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982); United States v. SCRAP, 412 U.S. 669, 690 n.15 (1973).

438 U.S. 59, 74, 75 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44-45 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975); United States v. SCRAP, 412 U.S. 669, 688-89 (1973). The plaintiff need only be able to show a "substantial likelihood" that granting judicial relief would provide redress for the injury alleged. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75 n.20 (1978); Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252, 264 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 45 (1976); Warth v.

Seldin, 422 U.S. 490, 564 (1975). It need not be shown that relief is likely to redress all of the plaintiff's injuries; rather, the likelihood of redress of a discrete portion of the injury suffices. Larson v. Valente, 456 U.S. 228, 243 n.15 (1982); Orr v. Orr, 440 U.S. 268, 273 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977); United States v. SCRAP, 412 U.S. 669, 688-89 & n.14 (1973).

A. Respondents Have Alleged Injury To Themselves.

These black parents and children allege harm of the utmost concreteness and seriousness. The children are attending public schools, once deliberately segregated and now undergoing the process of desegregation (not schools that are indisputably integrated or

finally and stably desegregated).12/ This process of desegregation is being disrupted and thwarted by the operation of racially discriminatory private schools in their respective communities, schools that attract white children who are avoiding the desegregation of the public schools. After long subjection to an openly segregated dual system of public schools, respondents are still deprived of the advantages of truly integrated public education by the interference of these private schools, whose operation and expansion is supported by federal tax subsidies. Their

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12/ The federal petitioners' insistence that these children can be suffering no harm because their schools are already "desegregated," Brief for Federal Petitioners at 31, displays a shocking indifference to the realities of desegregation in communities like Memphis and Prince Edward County. By ignoring the kinds of interference alleged in the Complaint, the government's brief addresses an imaginary world, and not this case at all.

injuries are compounded and made more stigmatizing by the federal government's complicity with the continuation of the segregated school structure in its most recent guise: the new dual school system of all-white tax-supported private schools and racially identifiable public schools.

Petitioners labor to ignore these allegations of harm, but the Complaint sets them out clearly, indeed repetitively. It alleges the injuries suffered by the plaintiff class as a whole, and contains individual allegations of harm for each of the named plaintiffs,13/ in some instances with

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13/ See Complaint, ¶¶ 27 (Memphis, Tennessee); 28 (Natchitoches Parish, Louisiana), 29 (Orangeburg, South Carolina, District No. 3), 46 (Orangeburg, South Carolina, District No. 2), 30 (Beaufort County, South Carolina); 31 (Prince Edward County, Virginia), 33, 47 (Montgomery, Alabama), 34 (Cairo, Illinois), 37 (Boston, Massachusetts), 41, 42 (Madison Parish, Louisiana), 45 (City of Monroe, Louisiana), J.A. 27-37.

particulars concerning the events in the local school system. 14/ No evidence has been presented, but this is because the district court erroneously short-circuited the case before it reached the evidentiary stage. See pages 16-17 supra.

14/ See, e.g., Complaint ¶¶ 31 (only 64 white children attended public school in Prince Edward County in 1970, while 1,311 white children attended Prince Edward Academy); 33 (district court finding of interference with desegregation in Montgomery, Alabama affirmed by this Court); 34 (U.S. Commission on Civil Rights findings of interference with desegregation in Cairo, Illinois); 41 (district court finding of interference with desegregation in Madison Parish, Louisiana). Many of the plaintiffs are class members in their local school desegregation litigation. See, e.g., Northcross v. Board of Education, 302 F.2d 818 (6th Cir.), cert. denied, 370 U.S. 944 (1962) (Memphis); Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.); aff'd, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975) (Boston); Carr v. Montgomery County Board of Education, 232 F. Supp. 705 (M.D. Ala. 1964) (Montgomery).

Of course, the decision of the court of appeals should be affirmed even if only one of the plaintiffs has standing. See, e.g., Director, Office of Workers' Compensation Programs v. Perini North River Associates, 103 S. Ct. 634, 640-41 (1983); Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981).

Petitioners cannot seriously contend that racially discriminatory private schools do not interfere with desegregation. Judicial, legislative, executive, and scholarly sources all confirm the seriousness of this interference; many of these findings expressly address the very communities in which the named plaintiffs reside. See, e.g., Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974) (Montgomery, Alabama, where the children of plaintiffs Beamon, Belser, House, and Lou Ella Jackson attend school); United States v. Scotland Neck City Board of Education, 407 U.S. 484, 491 (1972); United States v. State of Mississippi, 499 F.2d 425, 435 (5th Cir. 1974); Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975) (inter alia Madison Parish, where the children of plaintiff Williams attend school); Proposed IRS

Revenue Procedure Affecting Tax Exemptions of Private Schools: Hearings Before the Subcommittee on Oversight, House Committee on Ways and Means, 96th Cong., 1st Sess. [hereinafter cited as 1978 Hearings] 614-716 (1979) (testimony of Regina O'Leary); id. at 731-32 (testimony of Arthur S. Flemming, Chairman of United States Commission on Civil Rights); U.S. Commission on Civil Rights, Twenty Years After Brown 62-63 (1975); U.S. Commission on Civil Rights, Cairo, Illinois: A Symbol of Racial Polarization 34-35 (1973) (Cairo, Illinois, where the children of plaintiffs Koen, Johnson, and Hollis attend school); G. Orfield, Must We Bus? 59-61 (1978).

Discriminatory private schools disrupt desegregation in numerous ways. Most obviously, the diversion of white

children to segregation academies 15/ may leave insufficient numbers of white pupils in the public school system for all the schools to be integrated. 16/ To this date, two-thirds of the white children in Prince Edward County attend the Prince Edward Academy, while the public schools remain 75% black. 17/

15/ Diversion of these students into segregated private schools is not justified by any "right" of the students or their parents, as Petitioner Allen appears to believe. See Brief for Petitioner Allen at 29-30. This Court has adamantly maintained that there can be no constitutional right to offer or receive segregated education. Bob Jones University v. United States, 103 S. Ct. 2017 (1983); Runyon v. McCrary 427 U.S. 160 (1976).

16/ See, e.g., 1982 Hearings, supra note 6, at 26-35 (1983) (testimony of School Superintendant W.W. Herenton) (concerning Memphis, where the children of plaintiffs Inez Wright and Walker attend school).

17/ Id. at 68 (testimony of Arthur S. Flemming, Chairman of United States Commission on Civil Rights). See also Robertson v. Natchitoches Parish School Board, 431 F.2d 1111 (5th Cir. 1970) (where the children of plaintiff Robert Jackson attend school); Kelley v. Metropolitan

(footnote continues)

Attempts to reestablish the old dual school system on a semi-private basis can also threaten the fiscal and educational soundness of the remaining public schools, when resort by a large proportion of the white population to segregation academies makes them unwilling to pay local taxes for support of the public schools. 18/

(footnote continued)

County Board, 492 F. Supp. 167, 189-90 (M.D. Tenn. 1980) (Nashville schools); Brumfield v. Dodd, 405 F. Supp. 338, 346 (E.D. La. 1975) (Madison Parish, where the children of plaintiff Williams attend school).

18/ See, e.g., 1982 Hearings, supra note 6, at 31-32 (testimony of Memphis Superintendant W.W. Herenton); School Desegregation: Hearings Before Subcomm. on Civil & Constitutional Rights, House Comm. on Judiciary, 97th Cong., 1st Sess. 327 (1982) (testimony of Memphis Board of Education President Maxine A. Smith); D. Nevin & R. Bills, The Schools That Fear Built 87 (1976); Note, 82 Yale L.J. 1436, 1445 & n.59, 1448 n.71 (1973); U.S. Commission on Civil Rights, Cairo, Illinois: A Symbol of Racial Polarization 35 (1973) (Cairo, Illinois, where the children of plaintiffs Koen, Johnson, and Hollis attend school).

The parallel existence of segregated private schools in the community also disrupts the ability of the public schools to promote racial harmony and a truly integrated educational atmosphere. As this Court emphasized in Bob Jones University v. United States, 103 S. Ct. 2017, 2040 (1983), Gilmore v. City of Montgomery, 417 U.S. 556, 571 (1974), and Norwood v. Harrison, 413 U.S. 455, 469 (1973), "discriminatory treatment exerts a pervasive influence on the entire educational process." Deprivation of the benefits of an integrated school system or an integrated community in itself constitutes sufficient injury in fact to confer standing on a plaintiff. Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979); Trafficante v. Metropolitan Life

Insurance Co., 409 U.S. 205, 209-10, 211 (1972); cf. Washington v. Seattle School District No. 1, 102 S. Ct. 3187, 3196 (1982); Bradley v. School Board, 416 U.S. 696, 718 (1974).

The very fact of federal involvement in these segregation academies through tax subsidies inflicts a discrete additional injury on the affected black children. 19/ The grant of tax-exempt status not only provides enormous financial advantages to discriminatory schools, but also places the government's "'power, property and prestige behind the

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19/ This Court's decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) demonstrates this principle. There the Court held that Irvis had standing to enjoin enforcement of a state regulation that would require Moose Lodge to enforce its discriminatory guest rules, although the absence of state action left Moose Lodge free to enforce the same rule in its discretion. Justice Rehnquist recognized that Irvis would still be unable to visit the Lodge, but insisted that the state's authority must be disengaged from his deprivation.

admitted discrimination.'" Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)); see Green v. Kennedy, 309 F. Supp. 1127, 1135 (D.D.C.), appeal dismissed, 398 U.S. 956 (1970). Federal approval and support of these modern dual school systems "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Education, 347 U.S. 483, 494 (1954). 20/ Because of the special susceptibility of children

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20/ Federal petitioners' dismissal of this injury as nonactionable "'psychological' discomfiture," Brief for Federal Respondents at 26, is typical of their efforts to repudiate the entire heritage of Brown. Theirs is the doctrine of Plessy v. Ferguson: "[if] enforced separation of the two races stamps the colored race with a badge of inferiority [it is] solely because the colored race chooses to put that construction upon it." 163 U.S. 537, 551 (1896).

and the pervasive destructiveness of discrimination in education, this Court has insisted that the government must steer clear of providing any tangible assistance to discriminatory private schools, regardless of whether their operation has any impact on desegregation of the public schools. Norwood v. Harrison, 413 U.S. 455, 467-68 (1973). In Gilmore v. City of Montgomery, 417 U.S. 556, 571 (1974), the Court recognized that interaction between black public school children and the operations of a segregation academy receiving government aid could undermine the benefits of desegregation.

All of the injuries detailed above afflict black schoolchildren who come under the shadow of a tax-exempt segregation academy, regardless of whether those children desire admission to the

academy. Just as plaintiffs in desegregation cases have never been asked to prove that they wish to attend a particular all-white public school, so the children here need not allege that they feel deprived of the "benefits" of attending Prince Edward Academy or Briarcrest. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971); Green v. County School Board, 391 U.S. 430, 435-38 (1968); Bradley v. School Board, 382 U.S. 103 (1965); McNeese v. Board of Education, 373 U.S. 668 (1963); Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Brown v. Board of Education, 84 F.R.D. 383 (D. Kan. 1979).

Thus, the Complaint does not allege, as petitioners incongruously insist, a "generalized grievance," or an abstract disagreement over the government's responsibility to observe fundamental

law. Each plaintiff suffers concrete injury from the government's support of one or more of these invidious institutions in his individual community. Each particular injury is shared, it is true, by the class of black schoolchildren attending public schools in that community, the same class involved in the ongoing desegregation litigation in several of these districts. And each particular injury has a basic similarity to the injury inflicted through other routes by the IRS's support of segregation academies in other communities. But this injury is no more "generalized" or abstract than the injury alleged in the original desegregation actions. "[S]tanding is not to be denied simply because many people suffer the same injury." United States v. SCRAP, 412 U.S. 669, 687 (1973); Sierra Club v. Morton, 405 U.S.

727, 738 (1972); Baker v. Carr, 369 U.S. 186, 208 (1962).

B. Respondents' Injury Is Traceable To The IRS, And Is Redressable

Both aspects of the injury alleged in the Complaint are traceable to the conduct of the IRS, and are redressable by relief directed at the IRS. 21/ This is obvious in the case of the injury resulting ipso facto from the federal imprimatur placed on the operation of segregation academies by means of the charitable exemption and the resulting financial support. To remove the federal

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21/ Needless to say, the question at the present juncture is not whether respondents are entitled to the precise form of relief they suggested in their Complaint, or whether they are actually entitled to any relief at all. The question is whether, assuming they prevail on their claims, judicial relief could be fashioned that would be likely to redress their injuries. See Larson v. Valente, 456 U.S. 228, 243 (1982); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).

involvement is to remove that particular injury. 22/ Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Norwood v. Harrison, 413 U.S. 455 (1973); Evans v. Abney, 396 U.S. 435 (1970). The court of appeals held that respondents had standing on precisely this basis, and its judgment may be affirmed without looking to any other allegations detailing the harm. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." Larson v. Valente, 456 U.S. 228, 243 n.15 (1982).

The other aspect of the injury, interference with the desegregation

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22/ The federal petitioners do not deny this; they contend only that this injury is not cognizable injury to the respondents, ignoring Norwood, Gilmore, and all the other cases.

process, is also traceable to government actions and redressable by relief against the IRS. The financial impact of the charitable exemption is enormous. Exempt schools are freed of liability for social security taxes, as well as excise taxes on fuels and telephone service; 23/ they pay lower unemployment taxes, and preferred mailing rates. 24/ The government's counterclaim in the Bob Jones case was for nearly half a million dollars in unemployment taxes alone. Bob Jones University v. United States, 103 S. Ct. 2017, 2023 (1983). Most importantly, of course, federal income, estate, and gift tax deductions create powerful incentives for private donations to exempt schools

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23/ I.R.C. §§ 3121(b)(8)(B), 4041(g), 4253(j).

24/ I.R.C. § 3309(a)(2); 39 C.F.R. Parts 132, 134.

at federal expense. 25/ Petitioner Allen's own motion for intervention alleges:

> The revocation of tax exempt status would greatly injure the ability of Briarcrest to raise funds for any capital purposes, including improvements and expansion of educational facilities, and would substantially increase the effective net cost thereof, thereby ultimately affecting the quality of education and its cost to the students ... ... The deprivation of tax exempt status to Briarcrest, on the basis of the standards proposed herein, would seriously and detrimentally affect the rights of Applicant, under the First Amendment to the United States Constitution, to have his children educated in the school of his choice.

J.A. 48. Numerous representatives of the private schools have testified as to

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25/ See, e.g., I.R.C. §§ 170(c)(2)(B), 642(c)(2), 2055(a), 2522(a).

their dependence on tax-supported gifts. 26/ The expansion, and in many cases the survival, of segregation academies is "fairly traceable" to the IRS's wrongful grant of tax-exempt status.

One key factor demonstrating redressability of the injury is precisely the factor on which petitioners mistakenly rely. As the court of appeals observed,

> Plaintiffs do not dispute that it is "speculative," within the Eastern Kentucky frame, whether any private school would welcome blacks in order to retain tax exemption or would relinquish exemption to retain

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26/ See, e.g., 1978 Hearings, supra, at 302 (testimony of William Bentley Ball); id. at 388-89 (testimony of petitioner Allen); id. at 400 (testimony of John Esty); Tax Exempt Status of Private Schools: Hearings Before Subcomm. on Taxation, Senate Comm. on Finance, 96th Cong. 1st Sess. [hereinafter cited as 1979 Hearings] 115 (1979) (testimony of William Kelly) ("We are on a thin line between austerity and disaster."). See also Green v. Kennedy, 309 F. Supp. 1127, 1134-36 (D.D.C.), appeal dismissed, 398 U.S. 956 (1970); D. Nevin & R. Bills, The Schools That Fear Built 15, 75-76 (1976) (exemption "critical to those 'faith pledge rallies' that so many schools hold").

> current practices. They claim indifference as to the course private schools would take.

Interv. Pet. App. 18b. The reason for this "indifference" should be obvious -- if relief were granted, each segregated private school would have only two options, either of which would alleviate the injury to respondents. If a private school becomes nondiscriminatory in order to save its tax exemption, then respondents have vindicated all the rights at stake in this litigation: not only will federal support for the dual school system terminate, but the discrimination itself will cease. Instead, the private school may decide to give up its tax exemption. Then federal involvement with the dual system and the associated stigmatization will end, and the serious financial impact will inevitably decrease the school's capacity for interference

with the desegregation process in the public schools. It is admittedly speculative which course an individual private school will choose. But in either case, a significant portion of the injury to respondents is almost certain to be redressed.

The test for standing requires only a "substantial likelihood" that judicial relief, directly or indirectly, will bring about redress of a plaintiff's injury. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 75 n.20 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261-62 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 45 (1976); United States v. SCRAP, 412 U.S. 669, 688 (1973). For those schools that choose nondiscrimination, respondents' injury is

indisputably redressed. For schools that choose to relinquish their tax exemptions, the economics of private education make it far more than "substantially likely" that they either will become insolvent or will lose significant numbers of students back to the public schools. Amici have already pointed out Petitioner Allen's concession and the widespread agreement that most segregation academies depend deeply upon their tax exemptions. "No accurate data are available regarding rate of failure of these schools but the number appears to be high." D. Nevins & R. Bills, The Schools That Fear Built 176 (1976). For those that do survive, loss of tax subsidies will affect the educational quality of the private schools and consequently their degree of attractiveness to white parents. See Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974); U.S.

Commission on Civil Rights, School Desegregation in Ten Communities 23, 51 (1973) (return to public schools resulting from poor educational quality in segregated private schools). These financial constraints will also require segregation academies to raise tuition fees, and prevent them from offering scholarships to white children unable to pay the price of avoiding the public schools. See Green v. Kennedy, 309 F. Supp. 1127, 1135 (D.D.C.), appeal dismissed, 398 U.S. 956 (1970); D. Nevins & R. Bills, The Schools That Fear Built 73 (1976); U.S. Commission on Civil Rights, Cairo, Illinois: A Symbol of Racial Polarization 33 (1973). Every white child who returns to participate in desegregating the public schools is a welcome victory for the principle of nondiscrimination; each is considerably

more than an "identifiable trifle." See United States v. SCRAP, 412 U.S. 669, 689 n.14 (1975).

This case, therefore, has little in common with Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). In Simon, the indigent plaintiffs alleged no injury resulting directly from the actions of the IRS. Rather, they alleged that the IRS had erroneously interpreted I.R.C. §501(c)(3) in a manner that lessened the incentive for private hospitals to offer free medical care to indigents. This Court's analysis turned upon the likely results of granting the requested relief: once the IRS conditioned tax exemption on provision of free nonemergency medical care, the hospitals could either relinquish their tax exemptions or provide the free care. The indigents would not benefit in any way if

the hospitals relinquished their exemptions. The question of redressability therefore depended on the probability that a given private hospital would accept the cost of providing free nonemergency care to indigents in order to retain its tax exemption, a choice it otherwise had no obligation to make. Not only was this speculative, but available evidence indicated that private hospitals received very little of their revenue from charitable donations. Id. at 43-44. 27/ There

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27/ Simon is thus a case in which the causal chain alleged by the plaintiffs depended upon a conjectural link that contradicted the available empirical evidence. Simon does not rule out probable consequences of economic pressures on third parties as a basis for demonstrating the likelihood of redress. To do so would not only be irrational, but would be inconsistent with both earlier and later precedent. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 736-37 (1981); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 (1979); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Boston Stock Exchange

(footnote continues)

was "no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." Id. at 45-46.

Simon thus differs from the present case in at least three major respects. First, the alleged statutory misinterpretation by the IRS in Simon imposed no direct harm on the indigents, while the IRS's support of segregated private schools inflicts direct injury on children in the affected public schools, in violation of an affirmative constitutional duty. Second, the hospitals in Simon, to whom exempt status was financially unimportant, were just as likely

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(footnote continued)

v. State Tax Commission, 429 U.S. 318, 320 n.3 (1977); United States v. SCRAP, 412 U.S. 669, 688 (1973); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970).

to abandon as to retain their tax exemptions, while the severe dependence of private schools on exempt status and the fact that federal law forbids discrimination even in private education make the private schools far more likely to abandon discrimination than to risk extinction. Third, and most important, the indigents in Simon had nothing to gain if the hospitals gave up their tax exemptions, while respondents here would benefit in two distinct ways if a segregated school in their community becomes non-exempt: federal involvement in the operation of a local school system would cease, and the financial resources available to the segregation academy would be sharply curtailed, inevitably lessening the degree of its interference with the desegregation process. Respondents in this case are almost certain to

receive redress for significant portions of their injury, regardless of how any school reacts to the grant of relief. The precise choice to be made by each school may be speculative, but the prospect of relief for respondents is not.

II. NO PRUDENTIAL RULE DENIES RESPONDENTS STANDING.

Federal petitioners ask this Court to overlook respondents' Article III standing, and to give the IRS unreviewable discretion to inflict injury on black schoolchildren, by erecting a new "prudential" barrier to standing. This unprecedented "prudential" rule, especially designed for the convenience of taxing authorities, would categorically exempt from judicial scrutiny every case in which a "person not seeking a tax benefit [attempts to] challenge the tax

treatment of others," Brief for Federal Petitioners at 36. They would deny standing even to those rare plaintiffs who can make the showing demanded by Article III, regardless of the nature of the rights infringed by the tax officials' unlawful conduct. There is no support in reason, prudence, or precedent for so sweeping a rule, or for applying such a rule to the facts of this case.

A. There Can Be No Per Se Prudential Rule Against Standing To Challenge Unconstitutional Tax Treatment Of Another.

In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), the Secretary of the Treasury urged this Court to adopt the same "prudential" standing rule that the present Secretary advocates. The argument for adopting that rule in Simon was stronger because the plaintiffs there asserted only

statutory claims, while petitioners now seek a license to violate the Fifth Amendment. Yet even in Simon this Court declined to approve this novel "prudential" doctrine, and was obliged to decide the case on constitutional grounds instead.

Although the Court did not analyze the issue in Simon, ample precedent refutes the suggestion that tax treatment is always a private affair between the taxpayer and the taxing agency in which third parties can have no cognizable interest. Where unconstitutional tax treatment, favorable or unfavorable, causes injury to someone other than the taxpayer, this Court has frequently recognized the third party's standing to seek relief.

Examples abound. Even petitioners admit that taxpayers have always been able to challenge unequal treatment at

the hands of state or federal taxing authorities, whether on equal protection or other grounds. 28/ Since Flast v. Cohen, 392 U.S. 83 (1968), this Court has also taken for granted the standing of taxpayers to challenge direct or indirect tax benefits to religious organizations under the Establishment Clause. 29/ It

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28/ See, e.g., United States v. Ptasynski, 103 S. Ct. 2239 (1983) (Uniformity Clause); Regan v. Taxation with Representation of Washington, 103 S. Ct. 1997 (1983) (adjudicating First Amendment and Equal Protection claims); Kahn v. Shevin, 416 U.S. 351 (1974) (Equal Protection); WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968) (same); Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) (Commerce Clause); Henneford v. Silas Mason Co., 300 U.S. 577 (1937) (same); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 376 (1928) (Equal Protection). In Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946), this Court found an equal protection violation where the respondent's tax assessment was perfectly accurate, because the authorities had systematically made unlawfully low assessments against others.

29/ See Mueller v. Allen, 103 S. Ct. 3062 (1983); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Walz v. Tax Commission, 397 U.S. 664 (1970).

has twice upheld equal protection attacks by third parties on state and federal tax assistance to segregated private education. 30/ In Commerce Clause cases, the Court has recognized the standing of nontaxpayers adversely affected by discriminatory state taxes levied upon their suppliers or patrons. 31/ And the Court has routinely permitted the United States to litigate the constitutionality of state taxes imposed upon its vendors and contractors. 32/

30/ Coit v. Green, 404 U.S. 997 (1971), aff'g Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971); Griffin v. County School Board, 377 U.S. 218 (1964). Not surprisingly, federal petitioners do not even mention Griffin.

31/ Maryland v. Louisiana, 451 U.S. 725 (1981); Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1976); see also McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

32/ See, e.g., United States v. New Mexico, 455 U.S. 720 (1982); United States v. Tax Commission, 421 U.S. 599 (1975).

In each instance, permitting standing has been consistent with the valid prudential rule that a constitutional provision should normally be enforced by those persons whose rights it was intended to protect. 33/ See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 475 (1982). Misinterpretation or misapplication of Internal Revenue Code provisions usually implicates no statutory or constitutional rights of other parties. 34/ But where taxation

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33/ In this regard, the Brief for Federal Petitioners, at 28 n.24, draws precisely the wrong conclusion from Washington v. Seattle School District No. 1, 102 S. Ct. 3187 (1982). There the Court pointed out that protection of racial minorities is the core of the equal protection guarantee, and that assuring "desegregation of the public schools ... at bottom inures primarily to the benefit of the minority, and is designed for that purpose." 102 S. Ct. at 3196, 3203.

34/ For example, in Simon the indigents did not claim that I.R.C. §501(c)(3) or the ruling

(footnote continues)

practices conflict with constitutional safeguards, third parties whose constitutional rights are infringed have standing to seek redress. See Davis v. Passman, 442 U.S. 228, 235, 239 n.18 (1979).

At the same time, experience has demonstrated that the injured parties can exercise their rights to sue without subverting the administration of the tax laws. 35/ The dangers threatened by

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(foonote continued)

thereunder was designed to protect indigents from "harm" inflicted by hospitals; rather they were intended to channel government subsidies into the most beneficial institutions. The equal protection guarantee and the limit on Section 501(c)(3) exemptions in the present case, in contrast, are founded on the need to eradicate racial discrimination in education, for the protection of racial minorities. Bob Jones University v. United States, 103 S. Ct. 2017, 2030 (1983).

35/ The court of appeals observed that substantial constitutional challenges to federal taxation of a third person are very infrequent.

(footnote continues)

petitioners have never materialized. Furthermore, if prudential considerations do not forbid constitutional challenges to unfavorable treatment of a taxpayer by third parties who are adversely affected as a consequence, 36/ despite the fact that the taxpayer himself is always available to sue, then a fortiori they

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(footnote continued)

Federal petitioners' futile effort to disprove this statement merely confirms its validity, for they are reduced to padding the discussion with cases raising no constitutional issue and to mischaracterizing statutory cases brought purely for profit motives as "public interest." See Brief for Federal Respondents at 40 n.39, citing Lugo v. Miller, 640 F.2d 823 (6th Cir. 1981); Cattle Feeders Tax Comm. v. Shultz, 504 F.2d 462 (10th Cir. 1974); American Society of Travel Agents v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978); Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978); Educo, Inc. v. Alexander, 557 F.2d 617 (7th Cir. 1977); Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980).

36/ See cases cited in notes 31 and 32 supra.

permit challenges to unconstitutionally favorable treatment, which by definition results in injury to the constitutional rights of third parties alone.

Under petitioners' theory, if the IRS granted tax credits for tuition to segregated schools, no one would have standing to complain. If it deliberately gave special tax benefits only to segregated schools, then other private schools might have standing to object, but the injured black schoolchildren would not. If the IRS allowed tax credits for campaign contributions to defeat candidates on an "enemies list," the targeted candidates would have no standing to sue. Petitioners' arbitrary rule may have a plausible ring to it, but even a moment's reflection shows that it bears no relationship to the concepts of injury that

are supposed to control the analysis of standing.

Nor do the circumstances of the present case suggest prudential reasons for denying standing that are absent in the general case. The IRS simply demands blanket immunity from constitutional scrutiny, and extension of that immunity to scrutiny of its fundamental affirmative constitutional duty not to support racial discrimination in education. The relief sought by respondents would not disrupt the administration of the tax code. They do not ask the courts to watch over the commission of unintended errors or to police the exercise of case-by-case discretion. Rather, they are injured by a consciously adopted policy, embodied in a revenue procedure, that allows racially discriminatory schools to retain their tax exemptions so

long as they make insincere professions of nondiscrimination. The Commissioner of Internal Revenue himself candidly described this policy to Congress as "ineffective" and "indefensible;" he pointed out that even schools judicially determined to be discriminatory have remained tax-exempt because the IRS takes their selfserving statements at face value. 1979 Hearings, supra note 26, at 42, 63 (testimony of then-Commissioner Kurtz); 1978 Hearings, supra, at 5-6 (same). Respondents merely ask that this policy be replaced by one consistent with the IRS's constitutional duties. And, as is always the case with challenges to unconstitutional tax benefits, granting respondents relief would increase federal tax revenues, not impair them.

B. Prudential Considerations Militate In Favor Of Respondents' Standing To Challenge The IRS's Conduct On Statutory Grounds.

The prudential considerations that normally counsel against entertaining third-party challenges to tax benefits on purely statutory grounds lose their force under the circumstances of the present litigation. The purposes behind those prudential standing rules, to avoid premature decision and to minimize conflict with the other branches of government, would be ill-served by denying standing to raise statutory issues here, because the constitutional challenge would then go forward alone. Instead, the most weighty prudential concerns require that respondents be permitted to litigate their statutory theory so that unnecessary decision of the constitutional issues can be avoided.

Prudential limits on standing are discretionary, judicially created techniques that enable courts not to exercise their jurisdiction despite the fact that a litigant with Article III standing is properly before them. Because instrumental, pragmatic concerns motivate a prudential standing rule, however, it "should not be applied where its underlying justifications are absent." Singleton v. Wulff, 428 U.S. 106, 114 (1976); id. at 124-25 (Powell, J., concurring and dissenting); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783 n.14 (1980); Craig v. Boren, 429 U.S. 190, 193-94 (1977); Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

The major purpose of prudential standing rules is to avoid unnecessarily deciding questions of broad social import. Gladstone, Realtors v. Village

of Bellwood, 441 U.S. 91, 99-100 (1979); Singleton v. Wulff, 428 U.S. 106, 113-114 (1976) (citing Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)); id. at 124 & n.3 (Powell, J., concurring and dissenting) (same); Warth v. Seldin, 422 U.S. 490, 500 (1975). Moreover, they lessen the potential for friction with the executive and legislative branches. Warth v. Seldin, 422 U.S. 490, 500 (1975); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (1974); see Singleton v. Wulff, 428 U.S. 106, 124 n.3 (1976) (Powell, J., concurring and dissenting); United States v. Richardson, 418 U.S. 166, 188-96 (1974) (Powell, J., concurring). 37/

37/ A third justification sometimes stated for prudential standing rules -- assuring that the litigants will adequately argue the issues,

(footnote continues)

These very interests require that the courts be permitted to adjudicate the legality of federal petitioners' conduct on statutory grounds before addressing the serious constitutional issues that respondents have raised. In Bob Jones University v. United States, 103 S. Ct. 2017 (1983), this Court firmly rejected federal petitioners' doubts about the necessity to deny charitable exemptions to segregation academies, relying on statutory construction to pretermit the constitutional issue. Id. at 2032 n.24. "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that

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(footnote continued)

compare Singleton v. Wulff, 428 U.S. at 114, with id. at 124 n.3 (Powell, J., concurring and dissenting) -- has no relevance to the standing issue in this case, since only the injured third parties have any need to challenge the IRS's cozy relationship with segregation academies.

we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'" New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944)) (ellipsis in original). "Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947). This fundamental policy would be severely frustrated, not furthered, if the Court used a "prudential" standing rule to deny respondents the opportunity to challenge on clear statutory grounds precisely the same

conduct that they are challenging on constitutional grounds. See, e.g., Blum v. Bacon, 457 U.S. 132 (1982); Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979); Hagans v. Lavine, 415 U.S. 528 (1974); Rosado v. Wyman, 397 U.S. 397 (1970); cf. Wood v. Georgia, 450 U.S. 261, 265 (1981).

Denying standing to raise the statutory claims would also increase the level of interference with the political branches. A decision that I.R.C. §501(c)(3) requires the IRS to employ effective procedures for withholding tax exemptions from discriminatory schools would still leave Congress free to modify the enforcement policy. Forcing the lower courts to base their remedial decisions on the governments' affirmative constitutional duty would afford Congress less flexibility, and could bring the

courts prematurely to the kind of inter-branch confrontation that Petitioner Allen threatens in his petition.

Thus, the pragmatic considerations that inform the Court's prudential restrictions on standing weigh in favor of allowing respondents to litigate their statutory claims along with their constitutional ones. Whatever prudential standing rules may be appropriate in the context of other, purely statutory challenges, fundamental concerns of judicial policy require a different approach in the circumstances of the present case.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the

District of Columbia Circuit should be affirmed.

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Nos. 81-757 and 81-970

IN THE

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OCTOBER TERM, 1983

W. WAYNE ALLEN,

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Respondents.

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On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a non-profit membership corporation of which all the Catholic Bishops of the United States are members. The programs of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and com-

munications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its assistance as *amicus curiae* in litigation touching important issues pertinent to its areas of concern, particularly when they may affect the Catholic Church or its people in the United States.

Respondents are parents of children in desegregating school districts who challenge the efficacy of the guidelines and procedures by which officials of the Treasury Department (the "Petitioners"[1]) enforce the implicit requirement of section 501(c)(3) of the Internal Revenue Code that tax-exempt organizations operating schools not practice racial discrimination. Their standing to make this challenge has been sustained by the United States Court of Appeals for the District of Columbia Circuit.

Affirmance of the decision below could adversely affect all tax-exempt organizations, Catholic and otherwise, by opening the door to unnecessary, burdensome and potentially groundless challenges to their exempt status because of alleged noncompliance with one of the several statutory conditions to that status.

SUMMARY OF ARGUMENT

To accord standing to third parties to challenge actions of tax officials with respect to the status of tax-exempt organizations would unnecessarily place severe financial and other burdens on charitable and religious entities. Not only would they be obliged to incur substantial legal expenses to defend their interests, thereby diverting

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[1] Inasmuch as no reference will be made to the Petitioner Allen in No. 81-757 in this brief, the term "Petitioners" as used here will refer only to the Petitioners in No. 81-970.

precious resources contrary to the policy underlying tax-exemption, but they would become easy prey for persons opposed to their positions on controversial public issues. If qualification for exemption under section 501(c)(3) is thrown open to protracted litigation at the hands of third parties, there will also ensue a chilling effect on the First Amendment rights of tax-exempt organizations. As an organization whose tax-exempt status is under attack in litigation because of its opposition to abortion, this *amicus* seeks to apprise the Court of the detrimental potential of the decision of the Court of Appeals and to present a focus on legal and policy considerations which the parties and the court below have addressed insufficiently or not at all.

Respondents ask the Judiciary to supplant its judgment for that of the Secretary and the Commissioner, who are subject to congressional oversight, regarding the procedures by which they shall enforce the prohibition against racial discrimination under section 501(c)(3). Although the guidelines and procedures in place are within the permissible range of executive judgment and discretion, the Respondents nevertheless press for a judicial substitute in accord with their view of effective enforcement. In ultimate, practical terms, they seek to bring about the revocation of the exempt status of numerous private schools.

Because of the intrusive and disruptive nature of the kind of review and relief which they seek, there arises a serious question of whether Respondents can meet, as a practical matter, the redressability requirement for standing under Article III. The courts have long maintained a wise and salutary policy of noninterference with the reasonable exercise by tax officials of their judgment and discretion in administering and enforcing the tax

laws. This policy is founded upon an appreciation of the expertise and firsthand knowledge of these officials, and of the disruption which unnecessary judicial interference would occasion. The existence of this policy militates against the kind of relief which Respondents seek. Respondents cannot satisfy the redressability requirement for standing under Article III.

ARGUMENT

THE WELL-ESTABLISHED POLICY AGAINST UNDUE JUDICIAL INTERFERENCE WITH THE EXECUTIVE BRANCH REQUIRES DENIAL OF STANDING FOR LACK OF "REDRESSABILITY"

A. Segregated Education Is An Evil Which Requires A Balanced Attack

At the outset this *amicus* would emphasize its doctrinal commitment to the fundamental national policy of ending racial discrimination in education which underlies the Court's decision in *Bob Jones University* v. *United States*, 103 S.Ct. 2017 (1983). *See* National Conference of Catholic Bishops, *Brothers and Sisters to Us: A Pastoral Letter on Racism*, Quest for Justice 373, 376 (NCCB 1981). Under *Bob Jones*, the IRS is charged with the duty to deny or revoke tax-exempt status for any school which practices racial discrimination. Such enforcement has now been included in the array of remedies which constitute an arsenal of effective means for ending racial discrimination in education. *See, e.g.*, *Brown* v. *Board of Education*, 349 U.S. 294 (1955); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d *et seq*. The judicial creation of a further device which would allow private litigants to challenge IRS determinations regarding the tax-exempt status of

others is unnecessary and would undermine other important values.

The rule of standing adopted by the Court of Appeals has ominous and far-reaching implications for charitable and religious organizations exempt from taxation under section 501(c)(3). As one such organization, this *amicus* proposes to give voice to its concerns and to augment the arguments of the parties so that all relevant principles of law and policy considerations will be presented in this important case.

B. Potential Effects Of The Decision Below On Tax-Exempt Organizations

Subjecting organizations exempt from taxation under section 501(c)(3) to "citizen suits" aimed at the Secretary of the Treasury and the Commissioner of Internal Revenue could undermine the policy of tax exemption by visiting real and potentially crushing burdens upon exempt entities,thereby diverting resources intended for their charitable or religious purposes. Further, in certain cases such suits can have a serious "chilling effect" upon important First Amendment rights.

This *amicus* is an appropriate party to present such concerns to the Court because its exempt status is the subject of a pending lawsuit brought by third parties in which a district court has found standing on grounds somewhat similar to those relied upon by the Court of Appeals in this case. *See Abortion Rights Mobilization* v. *Regan*, 544 F. Supp. 471 and 552 F. Supp. 364 (S.D.N.Y., 1982). With no purpose to litigate those issues here, this *amicus* calls this case to the Court's attention as a concrete example of the kind of litigation which the holding below can be expected to engender if not reversed.

1. Financial Burdens

A tax-exempt organization whose status is challenged by third parties in a private action will be subject to the costs of defending its interests, either as a party or as a witness in discovery proceedings. This *amicus* has been subject to both of these expenses in *Abortion Rights Mobilization, supra.*

Initially, the suit was commenced in 1980 against the Secretary and the Commissioner. Subsequently, the plaintiffs added the USCC and the National Conference of Catholic Bishops ("NCCB") as parties defendant. Thereafter, all defendants moved to dismiss the complaint on standing and other grounds. In July, 1982 the suit was dismissed as to the Church defendants, but was allowed to go forward as against the government defendants. 544 F. Supp. 471. The government defendants' subsequent motion for certification of an interlocutory appeal was denied by the District Court. 552 F. Supp. 364.

In that action, voluminous and burdensome discovery is being pursued by the parties against this *amicus* and the NCCB despite their non-party status. This has necessitated a motion to quash the subpoenas. Even at this very early stage in the case, hundreds of hours of USCC and NCCB staff time and counsel time (involving two major law firms) have been expended. To date, the defense of its interests in this lawsuit has cost the Church very substantial sums of money.

The fact that such third-party challenges can significantly burden tax-exempt entities runs directly counter to the manifest legislative purposes which underly section 501(c)(3). Only last Term the Court stated that the basis for such special treatment is that "charities were to be given preferential treatment because they provide a benefit to society." *Bob Jones University* v. *United*

States, *supra*, 103 S.Ct. at 2207. The Court then quoted this statement by Senator Hollis: "For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 per cent." *Id.* To require tax-exempt organizations to expend significant sums to defend their status upon challenges by private litigants, however baseless the claims may be, would clearly divert such contributed monies from the intended charitable or religious purposes and contravene the policy of the law.

2. Potential Harassment—Controversial Issues

To accord standing here would open a Pandora's box of possibilities for actual (if not intentional) harassment of numerous exempt organizations which espouse controversial viewpoints on important public issues.

Tax-exempt religious and charitable organizations are frequently committed to strong positions on controversial public issues. *See Regan* v. *Taxation With Representation*, 103 S.Ct. 1997 (1983); *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 670 (1970). Section 501(c)(3) places many express and implicit qualifying conditions on exempt organizations. For example, an organization must be organized and operated exclusively for religious, charitable or other enumerated purposes. Further, it may not engage in substantial lobbying or political intervention. As this Court recently held, it may not violate fundamental public policy, at least in the realm of racial discrimination. *See Bob Jones University* v. *United States*, *supra*, 103 S.Ct. at 2025, 2029. Antagonists of a particular tax-exempt organization would have a wide field from which to choose a basis for challenging its compliance with section 501(c)(3).

In *Abortion Rights Mobilization*, this *amicus* has been subjected to precisely this kind of challenge. The plaintiffs there (initially invoking standing as voters, taxpayers, operators of abortion facilities, and clergymen) challenged the tax-exempt status of the USCC and NCCB, alleging quite erroneously that the "Church" has engaged in political campaigning as part of its effort to educate the public concerning its views on abortion. The resultant chilling effect which such challenges can have on the First Amendment rights of a target tax-exempt organization is obvious and significant.[2] *Cf. Speiser* v. *Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."). Under this regime, a tax-exempt organization engaged in controversial speech would act at its peril and be open to a "citizen suit" challenging its exempt status. The motives of the challenger would be irrelevant so long as some "arguable" basis for standing were alleged. Such a sword of Damocles over the heads of section 501(c)(3) organizations cannot help but cause them to hesitate to engage in controversial speech.[3]

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[2] It should be stressed that the option to form an affiliated organization under section 501(c)(4) to engage in substantial lobby activities, *Regan* v. *Taxation with Representation*, *supra*, does not necessarily insulate a given § 501(c)(3) organization from such attacks. It still can be alleged that the § 501(c)(3) organization has itself violated one of the statutory conditions, including the condition against substantial lobbying. For example, it can be alleged that the § 501(c)(3) organization has "subsidized" its affiliated § 501(c)(4) organization. *See Regan*, *supra*, 103 S.Ct. at 2000.

[3] Since most tax-exempt organizations are operated on a non-profit basis, the primary significance of tax-exempt status is the eligibility to receive tax-deductible contributions under section 170(c). Therefore, loss of section 501(c)(3) status would probably mean the loss of their sole or primary means of support for most such organizations.

In view of the unique and significant burdens which allowance of such challenges could place on exempt organizations, this *amicus* urges the Court to deny standing to private parties to challenge IRS regulations or determinations which govern the status of tax-exempt organizations.

C. The Relief Respondents Seek—Judicial Supervision Of Executive Discretion

In 1970 the IRS interpreted the essential requirement of section 501(c)(3) with respect to racial discrimination by tax-exempt schools in a manner which this Court has upheld. *See Bob Jones University* v. *United States*, *supra*, 103 S.Ct. 2017.[4] In 1975, IRS formulated criteria and procedures to effectuate this interpretation. Revenue Procedures 75-50, 1975-2 Cum. Bull. 587, sets forth guidelines and record-keeping requirements for determining the existence of racially discriminatory policies. *Id.* § 1.01. It is a comprehensive and detailed revenue procedure designed to require that "[a] school . . . show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy *it has operated in a bona fide manner in accordance therewith.*" *Id.* § 2.02. (Emphasis added.)

Although there may be genuine disagreement concerning the efficacy of Revenue Procedure 75-50, the procedures and criteria thereunder have been considered a workable and legitimate means of enforcing Revenue Ruling 71-447. *See Prince Edward School Foundation* v.

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[4] Revenue Ruling 71-447, 1971-2 Cum. Bull. 230, was issued by the IRS in 1970 to declare its interpretation of section 501(c)(3) as prohibiting racial discrimination in private schools as a condition for tax-exempt status.

C.I.R., 478 F. Supp. 107, 111-12 (D.C. 1979), *aff'd*, ___ F.2d ___ (D.C. Cir. 1980), *cert. denied*, 450 U.S. 944 (1981). Congress itself has intervened to prevent more stringent regulations from taking effect. Treasury, Postal Service, and General Appropriations Acts, 1980, P.L. 96-74, §§ 103 and 615, 93 Stat. 559 (1979).[5]

In their Complaint, Respondents name and describe a number of allegedly discriminatory tax-exempt schools located in the school districts where their children attend public schools. They do not allege that any of them has actually applied to or been denied admission by any of those schools. They expressly acknowledge that they "do not seek, in this lawsuit, either as relief or as a consequence of the relief awarded, admission to private schools which effectively exclude black students. Nor do they seek to compel the United States government to take any actions to change the racially discriminatory policies of any private schools." *See* Brief in Opposition to Certiorari, p. 8.

Apparently overlooking the enforcement realities exemplified in *Bob Jones University* v. *United States*, *supra*, 103 S.Ct. 2017, Respondents would impose their own criteria and procedures on the IRS under section 501(c)(3) and attach a presumption of racial discrimination to any school which fits one of the profiles proferred by respondents. Respondents' Complaint asks, *inter alia*, that the court:

> "Enter orders granting (1) preliminary and permanent injunctions restraining defendants from grant-

[5] This *amicus* takes no position here on the wisdom of Congress' action. The concern of this *amicus* is not with the power of Congress to control IRS, but rather with the power of private individuals and groups to control IRS through the courts and thereby affect the interests of tax-exempt organizations.

ing federal tax exemptions to, and (2) a permanent injunction restraining defendants from continuing tax exemptions now held by, private schools, or the organizations that operate them, which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either—

(1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;

(2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or

(3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems . . ."

Complaint, "Wherefore" clause, subd. (c). Clearly, the Respondents seek the revocation of the exempt status of numerous educational organizations.

Assuming *arguendo* that the Respondents are able to persuade the Court that they have sufficiently alleged actual injury to themselves or their children which is causally related to the action or inaction of the Petitioners,[6] there is a substantial question whether such injury is "redressable" for purposes of Article III standing.

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[6] This *amicus* neither concedes nor addresses this issue which the parties are expected to explore fully.

D. Respondents' Claims Fail To Satisfy The Redressability Requirements Of Article III

The Court has made it clear that to satisfy the threshold standing requirements of Article III, a party must not only make "allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed," but must also show that such injury is "redressable by the court." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976). Further, the prospect that the courts will redress the injury asserted must not be based upon "unadorned speculation," *Simon*, *supra*, 426 U.S. at 44, or "remote possibility," *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).[7] There must appear from the complaint a "substantial likelihood" that victory in the suit would provide complainants relief from their injury. *Simon*, *supra*, 96 S.Ct. at 1928.

The courts have long held to a salutary policy by which the Judiciary defers to the Executive branch, in particular the Secretary of the Treasury, with respect to the latter's exercise of judgment and discretion in the performance of responsibilities imposed by law. *See Louisiana* v. *McAdoo*, 234 U.S. 627 (1914). In *McAdoo* the State of Louisiana, as a producer of sugar, challenged the tariffs set by the Treasury Department on sugar imported from Cuba as an exercise of "arbitrary power."

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[7] This kind of analysis has been applied most often when, as here, the theory of injury relied upon by a plaintiff involves the roles of two parties, a private individual and a government defendant, and the latter's action or inaction is alleged, as here, to have "encouraged" the injurious conduct of the former. *See, e.g., Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973).

Without deciding the merits, the Court observed (at p. 631-32):

> "[I]f the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government."

234 U.S. at 633. Similarly, the Court has declined to review an executive agency's discretionary decision setting tolls for the Panama Canal because it involved "a problem in the penumbra of the law where generally the Executive and the Legislative are supreme." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958).

Along these same lines, the Court has refused to interfere with criteria established by the taxing authorities for determining whether a particular organization is a "business league" for purposes of section 501(c)(6) of the Code. *National Muffler Dealers Ass'n.* v. *United States*, 440 U.S. 472, 476-77 (1979). In another case of special note, the Court has refused to set aside an I.R.S. regulation construing section 117 of the Code not to include grants given by employers to their employees for doctoral research as excludable "scholarships." *Bingler* v. *Johnson*, 394 U.S. 741 (1969).[8]

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[8] This rule limiting judicial interference with the workings of tax officials closely resembles the policy bases which underlie Article III's standing limitations. In its standing decisions the Court has noted the "implicit policies embodied in Article III," *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968), among which is the reluctance of the judiciary to exercise its power to defeat or interfere with the workings of the coequal branches of the government. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752, 759 (1982). This policy is concerned "about the

If there is any reasonable basis for sustaining a challenged tax regulation, and if the regulation is consistent with the statutes which authorize the Commissioner to act, the courts will defer to the judgment of the Commissioner unless there are "weighty" reasons for doing otherwise. *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fulman* v. *United States*, 434 U.S. 528, 536 (1978). While the Court has not defined what constitute "weighty" reasons for overruling the Commissioner's judgment, it appears that if there is a "reasonable basis" for a regulation, the Court will refuse to substitute its own judgment. *Fulman, supra*, 434 U.S. at 536.

The mere fact that different criteria may appear more efficacious than those developed by the Commissioner is not determinative. In *United States* v. *Correll*, 389 U.S. 299 (1967), the taxpayer challenged the reasonableness of the IRS's regulation governing the deductibility of the cost of meals while on business travel. The Court stated:

> "Alternatives to the Commissioner's sleep or rest rule are of course available. Improvements might be imagined. But we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variations it is the province of Congress and the Commissioner, not the courts, to make

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proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 499 (1975). *See, also, Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 221-27 (1974); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978).

> the appropriate adjustments. *Commissioner* v. *Stidger*, 386 U.S. 287, 296."

389 U.S. at 306-07.

This rule of limited judicial interference with the Commissioner's exercise of discretionary and judgmental functions grows out of a pragmatic appreciation of the expertise and responsibilities of the taxing authorities. As this Court succinctly stated in *Burnet* v. *S. & L. Building Corporation*, 288 U.S. 406, 415 (1933): "The Commissioner and Board of Tax Appeals have practical knowledge of the intricate details incident to tax problems, and their determination in circumstances like those under consideration here should be given effect when not clearly contrary to the will of Congress." *See American Commodity Traders* v. *Department of Treasury*, 598 F.2d 1233 (1st Cir. 1979). This arrangement ensures that "like cases will be treated alike," *National Muffler Dealers*, *supra*, 440 U.S. at 477, and helps guarantee that rules will be written by "masters of the subject," *id.*, quoting from *United States* v. *Moore*, 95 U.S. 760, 763 (1878).

The courts have been especially reluctant to interfere with IRS judgments and determinations regarding eligibility for exempt status under section 501(c)(3). Thus, in *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978), the court found that plaintiffs had sufficiently articulated injury in fact under the aegis of "competitive standing." However, it concluded that such standing criteria do not apply in the tax arena. "Whatever may be the impact of competitor standing when ordinary administrative action is at issue, we do not believe that [*Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150 (1970)] should be read to endorse standing for

any private business, individual or corporate, which wishes to contest the tax treatment of a competitor." 566 F.2d at 151. *See, also, Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Another manifestation of this policy has been the courts' insistence that administrative processes be followed fully, even where doing so would be burdensome to the organization seeking to retain such status. *See Bob Jones University* v. *Simon*, 416 U.S. 725 (1974).

Judicial deference to the IRS's exercise of judgment in the administration of section 501(c)(3) is not predicated on the assumption that the IRS will never err in administering the statute. Rather, the courts assume that difficulties may arise but that Congress is the appropriate body to consider changes based on a weighing of "the relevant policy-laden considerations." *Bob Jones University* v. *Simon*, 416 U.S. 725, 749-50 (1974).

As a further consideration, to grant the relief sought by Respondents could lead to the monitoring of IRS administration of tax exemptions on a massive scale. It appears there are some 20,000 private schools currently recognized as tax-exempt under section 501(c)(3) of the Code. *See* Petition for Certiorari of Petitioners Regan *et al.*, at 19. There are probably more than ten times that number of various entities which have received determination or ruling letters from IRS. *See* Cumulative List of Organizations, Publication 78 (G.P.O. 1983).[9] To require IRS to investigate the continued eligibility of an exempt organi-

[9] The Cumulative List contains a list of all entities (some 230,000 in number) which are known by IRS to have received ruling or determination letters as to their eligibility to receive tax-deductible contributions under section 170(c).

zation at the behest of any "concerned citizen" who alleges a generalized grievance could add a staggering burden to the present duties of IRS and the courts.

Congress has carefully delimited statutory standing under the Internal Revenue Code. The Declaratory Judgment Act, 28 U.S.C. § 2201, excepts "relief from federal taxes" from its general grant of power to federal district courts. In 1976, Congress enacted section 7428 to establish a single qualification of this tax exception. Prompted by the Court's strict application of the tax exception in *Bob Jones University* v. *Simon*, *supra*, 416 U.S. 725, it allowed declaratory relief for denials of tax-exempt status under section 501(c)(3). However, section 7428(b) expressly withheld this remedy from third parties: "A pleading may be filed under this section only by the organization the qualification or classification of which is at issue." Section 7428 was intended to create the exclusive judicial procedure, other than the normal avenues of judicial review (redetermination of a deficiency or suit for a refund of taxes) for litigating determinations of the section 501(c)(3) status of organizations by the Secretary. H. R. Rep. No. 1380, 94th Cong., 2nd Sess. 587 (1976).[10]

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[10] It is true that in a legislative report accompanying the enactment of section 7428, the House Committee on Ways and Means characterized the Court's summary affirmance in *Coit* v. *Green*, 404 U.S. 997 (1971), *aff'g*, 330 F. Supp. (D.C. 1971), as "implicitly" holding that third parties could bring suit to restrain IRS from treating an organization as being exempt. *See* H.R. Rep. No. 1380, *supra*, at 587 n.6. However, this Court's statement in *Bob Jones University*, *supra*, 416 U.S. at 740 n.11, makes clear that *Coit* cannot be read as having precedential value. In all events, the House report neither endorses nor criticizes such "holding," and makes clear the new statutory provision, section 7428, "does not deal with this matter." H.R. Rep. No. 1380, *supra*, at 587 n.6.

Even if it be assumed that through some failure in IRS enforcement mechanisms, some racially discriminatory schools have escaped sanction, it does not follow that correction of this situation must be obtained through judicial intervention. "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress . . . ." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). Just as Congress has seen fit to interject itself into the continuing controversy over the relationship between a school's policy and its eligibility for tax-exempt status (*see* p. 10, *supra*), it cannot be lightly assumed that it would turn a deaf ear to legitimate claims of deficient enforcement by those actually aggrieved by the IRS. As Justice Powell has cautioned:

> "the argument that the Court should allow unrestricted taxpayer or citizen standing, underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government."

United States v. *Richardson*, 418 U.S. 166, 188-89 (1974).

It seems relevant and correct to state that concerns over IRS enforcement should await developments in the wake of the Court's recent decision in *Bob Jones University* v. *United States*, *supra*, 103 S.Ct. 217. Prior to that decision, the IRS interpretation of section 501(c)(3) and its corresponding guidelines were open to differences of legal opinion. The prohibition against discrimination was

not explicit in the statute. Indeed, a contrary view was adopted by the Administration in 1982 when it announced its intention to revoke Revenue Procedure 75-50. The legal situation is now clear for the first time. As a matter of good judgment, it seems appropriate to assume that judicial clarity will breed greater administrative clarity, and that the force of public and congressional opinion will reinforce the will of the Executive.

For altogether sound and important reasons, reasons which go right to the root of our tripartite form of government, the courts clearly should not entertain claims of the kind asserted by Respondents here. Thus, whether or not Respondents have sustained actual injury sufficient to satisfy the minimal requirement of Article III, their Complaint should be dismissed because, as a practical matter, their grievance is not redressable by the courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the Complaint dismissed.

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Docket Sheet

No. 81-757-CFX
Status: GRANTED

Title: W. Wayne Allen, Petitioner
v.
Inez Wright, etc., et al.

Docketed:
October 20, 1981

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
81-970

Counsel for petitioner: Landers II, William Joseph

Counsel for respondent: Solicitor General, Kapp, Robert H., Chachkin, Norman J., Hassett, Joseph M.

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1981	G	Petition for writ of certiorari filed.
3	Nov 2 1981		Order extending time to file response to petition until December 27, 1981.
4	Dec 28 1981		Brief of respondents Inez Wright, et al in opposition filed. VIDED.
5	Jan 6 1982		DISTRIBUTED. January 22, 1982
6	Jun 13 1983		REDISTRIBUTED. June 16, 1983
7	Jun 20 1983		Petition GRANTED. The case is consolicated with 81-970 and a total of one hour is allotted for oral argument.
			**********
9	Jul 25 1983		Order extending time to file brief of petitioner on the merits until September 3, 1983.
10	Aug 8 1983		Joint appendix filed. VIDED.
11	Aug 11 1983		Record filed.
12	Aug 11 1983		Certified original record & C.A. proceedings receivec.
13	Sep 2 1983		Brief of petitioner W. Wayne Allen filed. VIDED.
14	Sep 16 1983		Brief amicus curiae of U.S. Catholic Conference filed. VIDED.
15	Sep 16 1983		Brief of petitioner Donald T. Regan, et al. filed. VIDED.
17	Sep 26 1983		Order extending time to file brief of respondent on the merits until October 19, 1983.
18	Sep 29 1983	G	Motion of the Solicitor General for civiced argument filec.
19	Oct 11 1983		Motion of the Solicitor General for civiced argument GRANTED.
20	Oct 12 1983		Order further extending time to file brief of respondent on the merits until November 2, 1983.
21	Nov 2 1983		Brief amicus curiae of NAACP, et al. filec. VIDED.
22	Nov 2 1983		Brief of respondents Inez Wright, et al. filed. VIDED.
23	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 29, 1984. This case is consolidated with No. 81-970. (1 hour) (1st case)
24	Jan 11 1984		CIRCULATED.
25	Feb 16 1984	X	Reply brief of petitioner (Federal) filec. VIDED.
26	Feb 29 1984		ARGUED.